FILED

No. 96-952074 JUN 25 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lowell F. Denton, Esq.
DENTON, MCKAMIE
& NAVARRO
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205
(210) 227-3243

Gordon L. Hollon, Esq.
101 N. Saunders
Boerne, Texas 78006
(210) 249-2521

Attorneys for Petitioner
City of Boerne, Texas

Marci A. Hamilton, Esq.
482 Kings Road
Yardley, Pennsylvania 19067
(215) 493-1973

Counsel of Record

10 pp

QUESTIONS PRESENTED

In 1990, this Court held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause of the First Amendment does not require governments to accommodate religious conduct in conflict with neutral, nondiscriminatory, generally applicable laws. *Smith*, 494 U.S. at 885. While legislatures *could* enact specific exemptions from generally applicable laws, such accommodation was not mandated by the Free Exercise Clause. *Id.* at 890. The majority's opinion in *Smith* was greeted with criticism by members of this Court, *see, e.g.*, *Smith*, 494 U.S. at 890 (O'Connor, J., concurring); *id.* at 907 (Blackmun, J., dissenting), as well as others. *See e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1.

Congress not only disagreed with the *Smith* Court's reading of the Free Exercise Clause, it took action to repudiate *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb (1993). RFRA is Congress's self-conscious attempt to expand the scope of protection for the free exercise of religion. By its terms, it dictates the standard of review all courts must apply to any federal, state, or local law burdening the exercise of religious conduct. If a law substantially burdens religious conduct, the government is required to accommodate it unless it can prove that its law serves "a compelling governmental interest" that is achieved by "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In effect, RFRA directs state and local governments to accommodate religious conduct more than the Supreme Court declared the Free Exercise Clause requires in either *Smith* or the pre-*Smith* case law.

The Questions that arise from the Fifth Circuit's decision affirming the constitutionality of RFRA are:

1. Whether Congress violated the constitutional balance between its power under Section 5 of the Fourteenth Amendment and fundamental principles of federalism by comman-

deering state and local governments to be agents of a federal policy to accommodate religious exercise more than the Constitution requires.

2. Whether Congress violated the separation of powers doctrine by legislatively overruling a Supreme Court determination of the scope of the Free Exercise Clause of the First Amendment.

3. Whether Congress violated the Establishment Clause of the First Amendment by broadly and exclusively privileging religion over other expressions of conscience.

4. Whether *Katzenbach v. Morgan*, 384 U.S. 641 (1966), should be overruled in part.

TABLE OF CONTENTS

PAGE

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 1

Statement of the case 1

Reasons for granting the writ 4

I. THE FIFTH CIRCUIT'S DECISION UPHOLDING RFRA PRESENTS AN IMPORTANT FEDERAL QUESTION OF PRESSING NATIONAL CONCERN REGARDING THE EXTENT OF CONGRESSIONAL AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT 4

A. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Federalism Doctrine 5

B. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Separation of Powers Doctrine 16

C. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Establishment Clause Doctrine 19

II. THE SCOPE OF CONGRESSIONAL POWER TO REVISE THE BILL OF RIGHTS PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 20

PAGE

Conclusion 27

Appendix A 1a

Appendix B 24a

Appendix C 30a

Appendix D 32a

Appendix E 33a

Appendix F 35a

Appendix G 39a

Appendix H 43a

INDEX TO APPENDICES

Appendix A Decision of the Fifth Circuit Court of Appeals 1a

Appendix B Decision of the District Court for the Western District of Texas 24a

Appendix C Order Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing 30a

Appendix D Order Granting the United States the Right to Intervene 32a

Appendix E Judgment of the U.S. Court of Appeals, Fifth Circuit 33a

PAGE

Appendix F Constitution of the United States of America

Article I 35a

Article III 35a

Amendment I 36a

Amendment X 36a

Amendment XIV 36a

Appendix G Religious Freedom Restoration Act 39a

Appendix H City of Boerne, Texas, Zoning Ordinance 43a

TABLE OF AUTHORITIES

Cases PAGE

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 11, 21

Akbar-El v. Muhammed, 663 N.E.2d 703 (Ohio App. 1995) 10

Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995) 7

Belgard v. State of Hawaii, 883 F. Supp. 510 (D. Haw. 1995) 12

Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994) 5, 7

Bob Jones University v. United States, 461 U.S. 574 (1983) 6

Bowen v. Roy, 476 U.S. 693 (1986) 6

Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) 7

Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) 7

Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) 10

Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th Cir. 1990).... 15

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 11

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 22, 26

City of Rome v. United States, 446 U.S. 156 (1980)... 20, 23

PAGE

Civil Liberties for Urban Believers v. City of Chicago, No. 94-C-6151, 1996 WL 89241 (N.D. Ill. Feb. 27, 1996) 14

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) 15

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) 12

EEOC v. Wyoming, 460 U.S. 226 (1983)..... 10, 24

Employment Division v. Smith, 494 U.S. 872 (1990) ..... i, 4, 5, 11, 14, 15, 16

Fawaad v. Jones, 81 F.3d 1084 (11th Cir. 1996)..... 10

First Assembly of God of Naples, Florida, Inc. v. Collier County, Florida, 20 F.3d 419, *modified*, 27 F.3d 526 (11th Cir. 1994)..... 15

Flores v. City of Boerne, Texas, 73 F.3d 1352 (5th Cir. 1996)..... 1, 2, 3, 4, 11, 14, 18, 19, 25

Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) 2, 12, 14, 19

Francis v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995).. 7

Gaston County, North Carolina v. United States, 395 U.S. 285 (1969) 23

Gilmore-Bey v. Coughlin, No. 93-6592 (CLB), 1996 WL 306762 (S.D.N.Y. June 5, 1996) 11

Goldman v. Weinberger, 475 U.S. 503 (1986) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 8, 9, 21, 25

Grosz v. City of Miami Beach, Florida, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) 15

PAGE

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996) 6, 10, 12, 17, 18, 22, 23, 25

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 6

Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989) 6

Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995) 6

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) 6

Hutto v. Finney, 437 U.S. 678 (1978) 25, 26

Islamic Center of Mississippi, Inc. v. City of Starkville, Mississippi, 840 F.2d 293 (5th Cir. 1988) 15

Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990) 6

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996) 6, 10

Katzenbach v. Morgan, 384 U.S. 641 (1966) ..... ii, 10, 19, 21, 22, 23

Keeler v. Mayor of Cumberland, No. Civ. A. S-96-167, 1996 WL 311701 (D. Md. June 10, 1996) 12, 19, 21, 22

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) 15

Lawson v. Singletary, No. 94-4663, 1996 WL 280447 (11th Cir. May 29, 1996) 10, 19

Lemon v. Kurtzman, 403 U.S. 602 (1971) 19

PAGE

Loving v. United States, No. 94-1966, 1996 WL 287732 (June 3, 1996) 16

Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439 (1988) 6

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996)..... 10, 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 3, 16, 24

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 4

McDaniel v. Paty, 435 U.S. 618 (1978)..... 6

Meyer v. Federal Bureau of Prisons, No. 95-02263, (CRR) 1996 WL 284868 (D.D.C. May 24, 1996) 11

Miller v. Johnson, 115 S. Ct. 2475 (1995)..... 16

Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) 10

Muhammad v. City of New York, 904 F. Supp. 161 (S.D.N.Y. 1995)..... 7

New York v. United States, 505 U.S. 144 (1992) 7, 8, 11, 21, 24, 25

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 6

Oregon v. Mitchell, 400 U.S. 112 (1970) 16, 24, 26

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 14

Planned Parenthood v. Casey, 505 U.S. 833 (1992)... 11

Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) 11, 16

PAGE

Printz v. United States, No. 95-1478, *cert. granted*, 1996 WL 122493 (June 17, 1996) 7, 27

Roe v. Wade, 410 U.S. 113 (1973) 24

Rosenberger v. Rector & Visitors of University of Virginia, 115 S. Ct. 2510 (1995)..... 19

Sasnett v. Sullivan, 908 F. Supp. 1429 (W.D. Wis. 1995) 12

Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) 7, 21

Shaw v. Reno, 509 U.S. 630 (1993) 23

Sherbert v. Verner, 374 U.S. 398 (1963)..... 6

Smith v. Fair Employment & Housing Commission, 913 P.2d 909 (Cal. 1996) 10, 12

South Carolina v. Katzenbach, 383 U.S. 301 (1966) .. 23

South Ridge Baptist Church v. Industrial Commission of Ohio, 911 F.2d 1203 (6th Cir. 1990) 15

Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975)..... 9

Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274, *cert. denied*, 115 S. Ct. 460 (1994) 10

Tessier, In re, 190 B.R. 396 (Bkrtcy. D. Mont. 1995) . 12

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 6

Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985)..... 6

Turner v. Safley, 482 U.S. 78 (1987) 6

PAGE

United States v. Lopez, 115 S. Ct. 1624 (1995) 7, 16, 20, 21

Werner v. McCotter, 49 F.3d 1476 (10th Cir.), *cert. denied*, 115 S. Ct. 2625 (1995) 6, 10

Widmar v. Vincent, 454 U.S. 263 (1981) 6

Wisconsin v. Miller, No. 94-0159 (Wis. June 20, 1996) 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6

Young, In re, 82 F.3d 1407 (8th Cir. 1996) 11, 12

Statutes:

U.S. Constitution:
- Article I, § 1 16
- Article III, § 1 16
- Amend. I ..... i, ii
- Amend. X ..... i, 3
- Amend. XIV, § 5 ..... 4, 22, 24

28 U.S.C. § 1254 1

28 U.S.C. § 1292(b) 2

28 U.S.C. § 1331(a) 2

28 U.S.C. § 2403(a) 2

The Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*:
- 42 U.S.C. § 2000bb 17, 20
- 42 U.S.C. § 2000bb-1(b) ..... i, 7
- 42 U.S.C. § 2000bb-2(1) 4, 5, 7
- 42 U.S.C. § 2000bb-3(a) 4, 7
- 42 U.S.C. § 2000bb-4 20

Federal Rule of Civil Procedure 54(b) 2

PAGE

Supreme Court Rule 10(a) 11

Ariz. Rev. Stat. Ann. § 13-3402(B)(1) 8

Colo. Rev. Stat. Ann. § 18-18-418(3) 8

Idaho Code § 37-2732A 8

Iowa Code Ann. § 124.204(8) 8

Kan. Stat. Ann. § 65-4116(c)(8) 8

Minn. Stat. Ann. § 152.02(4) 8

Nev. Rev. Stat. § 453.541 8

N.M. Stat. Ann. § 30-31-6 8

Or. Rev. Stat. § 475.992(5) 8

S.D. Codified Laws § 34-20B-14(7) 8

Tex. Code Ann. § 481.111 8

Wis. Stat. Ann. § 161.115 8

Wyo. Stat. § 35-7-1044 8

Miscellaneous:

139 Cong. Rec. E1216 (daily ed. May 11, 1993) 18

138 Cong. Rec. E617 (daily ed. March 11, 1992) 18

137 Cong. Rec. E2422 (daily ed. June 27, 1991) 18

HR Rep. No. 88, 103d Cong., 1st Sess. (1993) 20

Staff of the Subcommittee on Separation of Powers of Senate Committee on the Judiciary, 97th Cong., 1st Sess., Report on Human Life Bill (Comm. Print 1981) 24

PAGE

The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. (1990) 17

Federalist No. 78 *in* The Federalist Papers (Roy P. Fairfield ed. 1981) (Alexander Hamilton) 16

Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994) 13

Alexander Bickel, *The Voting Rights Act Cases*, 1966 Sup. Ct. Rev. 75 25

Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995) 12

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 9

Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) 13, 26

Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275 9

Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) 13, 19, 23, 24

PAGE

Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) . 13

Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65 (1996) 8, 9, 13, 19, 23

Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357 (1994) .. 5, 13, 26

Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994)..... 13

Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. Envtl. Aff. L. Rev. 793 (1989) 14

Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1 i

Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) 13

Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73 13

Ira C. Lupu, Of Time and the RFRA: *A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171 (1995)..... 13

PAGE

Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181 (1992) 13

Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983) 9

Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. Pa. L. Rev. 1029 (1993) 13

Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996)... 13

James C. Wilson, *RFRA: More Harm Than Good*, June 1996 Corrections Today 21..... 10

Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598 (1992) 14

OPINIONS BELOW

Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) reprinted in the Appendix, *infra*, at 24a-29a; *Flores v. City of Boerne, Texas*, 73 F.3d 1352 (5th Cir. 1996) reprinted in the Appendix, *infra*, at 1a-23a. Order Granting United States Leave to Intervene, March 13, 1995, reprinted in the Appendix, *infra*, at 32a; Order Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, denied March 28, 1996, reprinted in the Appendix, *infra*, at 30a.

JURISDICTION

The Fifth Circuit decision was reached on January 23, 1996; the petition for rehearing en banc, which was treated by the Fifth Circuit as a petition for rehearing, was denied on March 28, 1996. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993), reprinted in the Appendix, *infra*, at 37a-40a.

STATEMENT OF THE CASE

In 1991, the City of Boerne, Texas, enacted a historical preservation ordinance intended to "protect, enhance and perpetuate selected historic landmarks," and to "safeguard the City's historic and cultural heritage." Boerne, Tex., Zoning Ordinance Amend. 91-05 (1992), reprinted in the Appendix, *infra*, at 41a. *See Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1354 (5th Cir. 1996).

In 1993, the respondent archbishop applied for a building permit from petitioner city to enlarge the Saint Peter Catholic Church, which is a revival mission-style church built in 1923. The city's Landmark Commission recommended denial of the

permit application. The City Council denied the church's appeal. The church then filed this suit, pursuant to 28 U.S.C. § 1331(a), alleging *inter alia* that the historic preservation ordinance violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (1993).

During a pretrial hearing, the district court agreed to certify the question of RFRA's constitutionality pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States and for both parties to submit briefs addressing the constitutional issue. Both parties submitted briefs on the constitutional issue as did intervenor United States.

The district court held that RFRA was facially invalid because "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA" and therefore infringed on the long-settled authority of the courts " 'to say what the law is.' " *Flores*, 877 F. Supp. 355, 357 (W.D. Tex. 1995) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). The court noted Congress's power under Section 5 of the Fourteenth Amendment, but did not find it a persuasive basis for congressional authority in light of "Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary." *Flores*, 877 F. Supp. at 357. The district court certified its order for interlocutory appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) and entered a partial final judgment under Fed. R. Civ. P. 54(b). The archbishop and the United States appealed.

The court of appeals reversed on four grounds. First, the court held that Congress acted within its power under Section 5 of the Fourteenth Amendment on the theory that RFRA is remedial because it prohibits "budding or disguised constitutional violations," "sprouting constitutional violations," and "incipient constitutional violations." *Flores*, 73 F.3d at 1359-60.

Second, the court addressed the city's separation of powers challenge to RFRA. The city had argued that RFRA violates the separation of powers by permitting Congress to legislate an interpretation of the Constitution at odds with the Supreme Court, relying on this Court's statement in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), that it is the duty of the judiciary "to say what the law is." The court of appeals reasoned that because governments *may* accommodate religion more than the Free Exercise Clause requires, Congress has the power to force all governments to accommodate all religious conduct substantially burdened by a generally applicable law. It concluded: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive."

The court of appeals also termed as "facile" the United States' argument that RFRA is merely a statute that "provides legislative protection for a constitutional right over and above that provided by the Constitution." *Flores*, 73 F.3d at 1361. The court stated: "We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*." *Id.* Nevertheless, the court upheld RFRA on the theory that Section 5 permits Congress "an extraordinary exercise of power." *Flores*, 73 F.3d at 1362.

Third, the court rejected the city's argument that RFRA violates the Establishment Clause by privileging religion on the ground that RFRA does not coerce religious activity through "its own activities and influence." *Flores*, 73 F.3d at 1364. Finally, the court held that RFRA "on its face" does not violate the Tenth Amendment, but left "RFRA's applicability to particular areas of state regulation . . . for individual, case-by-case resolution." *Id.*

The city now requests this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

The Religious Freedom Restoration Act ("RFRA") requires government to accommodate religious conduct more than the Supreme Court has declared that the Constitution requires. It places this requirement on every government action—federal, state, and local—taken in the past and in the future. *See* 42 U.S.C. §§ 2000bb-2(1), 3(a). As the court below made clear, RFRA was passed for the purpose of repudiating this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Flores*, 73 F.3d at 1355.

RFRA is vast, intrusive, and rigid. Its supporters have looked to Section 5 of the Fourteenth Amendment as a source of congressional power, but they have concomitantly ignored the inherent constitutional limits to Congress's exercise of its Section 5 powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). RFRA violates three structural features of the Constitution which are intended to preserve liberty by limiting government's capacity for tyranny: federalism, separation of powers, and the Establishment Clause. Its presumptuous scope and heavy burden on state and local governments, exacerbated by numerous conflicting constructions of its language and reach, require Supreme Court review at this time.

I. THE FIFTH CIRCUIT'S DECISION UPHOLDING RFRA PRESENTS AN IMPORTANT FEDERAL QUESTION OF PRESSING NATIONAL CONCERN REGARDING THE EXTENT OF CONGRESSIONAL AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

This case presents an important federal question of congressional power under Section 5 of the Fourteenth Amendment that requires resolution by this Court. After almost three years in operation, the Religious Freedom Restoration Act has cast a pall over state and local governments attempting to

carry on the important and difficult job of serving the people.[1] These governments require a definitive declaration of the constitutionality of RFRA, which commands them to accommodate religious conduct more than the Constitution requires.

A. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Federalism Doctrine

In 1990, this Court issued a watershed opinion addressing the extent to which the Free Exercise Clause of the First Amendment requires governments to accommodate religious conduct in conflict with neutral, generally applicable laws. *See Employment Div. v. Smith*, 494 U.S. 872 (1990). In that opinion, the Court declared that the Free Exercise Clause does not require governments to grant an individual exemption for the religious adherent if the state has enacted a neutral, nondiscriminatory, generally applicable law. *Smith*, 494 U.S. at 885.

Before *Smith*, this Court's Free Exercise case law applied varying standards, depending on the context of the case.[2] In

---

[1] RFRA applies to state, local, and federal government actions. *See* 42 U.S.C. § 2000bb-2(1). This case raises only the issue of Congress's power to enact RFRA against state and local governments, which is distinct from its power to enact RFRA against the federal government. *See generally* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 368-70 (1994).

[2] The context-dependent nature of this Court's pre-*Smith* Free Exercise jurisprudence is not unusual. This Court has often crafted constitutional rules under the Bill of Rights that are dependent on the particular context of a case. As Justice O'Connor pointed out in *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994) (O'Connor, J., concurring in part and concurring in the judgment):

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . . But the same constitutional principle may operate very differently in different contexts.

Id. at 2498-99.

a small number of cases, particularly those involving unemployment compensation benefits, this Court announced a compelling interest standard.[3] In a smaller number of cases, this Court announced a least restrictive means test, though it has never been used to invalidate a statute on Free Exercise grounds.[4] In others, this Court applied less exacting review, because the context demanded more deference to the government, and even applied rationality review in cases involving prisoners.[5]

---

[3] *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Bowen v. Roy*, 476 U.S. 693 (1986); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

[4] *See Thomas*, 450 U.S. at 718 (compelling interest and least restrictive); *Bowen*, 476 U.S. at 708; *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (rejecting less restrictive means alternatives); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (compelling interest and no less restrictive means available).

[5] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-453 (1988) (not requiring compelling government justification); *Turner v. Safley*, 482 U.S. 78 (1987) (applying low level scrutiny in prison context); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (applying low level scrutiny in prison context); *Bowen*, 476 U.S. 693 (1986) (Burger, C.J., plurality) (applying relaxed level of scrutiny where government action indirectly affects religious conduct); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (adjusting level of scrutiny downward because "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985) (not requiring exemption from government program unless at a minimum, program actually burdens claimant's freedom to exercise religious rights). A number of lower courts have held that RFRA repudiates the Court's prisoner Free Exercise cases. *See Jolly v. Coughlin*, 76 F.3d 468, 475 (2d Cir. 1996) (citing *O'Lone*, 482 U.S. at 350. *Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8th Cir. 1996); *Hicks v. Garner*, 69 F.3d 22, 25-26 (5th Cir. 1995); *Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir.), *cert. denied*, 115 S. Ct. 2625

In contrast to *Smith* and to this Court's Free Exercise jurisprudence before *Smith*, RFRA applies a single, extraordinarily high standard to every government action that burdens religious conduct. RFRA requires every "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State," 42 U.S.C. § 2000bb-2(1), to accommodate religious conduct in every context unless the government proves that it acted with "a compelling governmental interest" and its actions are "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Not only does RFRA apply to every conceivable government entity, it also applies to every government action taken past, present, and future. 42 U.S.C. § 2000bb-3(a). By "setting forth a unitary [and difficult] test for a broad set of cases, [Congress has dramatically altered this Court's Free Exercise jurisprudence and has] done more harm than good." *Kiryas Joel*, 114 S. Ct. at 2499 (O'Connor, J.).

The Religious Freedom Restoration Act is a bold and unprecedented example of federal social policy engineering that commandeers the states to follow the federal government's decision to accommodate religion more than the Constitution requires. Thus, it violates core constitutional principles of federalism grounded in the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 145 (1992).[6] Congress is a body of enumerated powers, and it must respect state integrity in that exercise. *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1127, 1132 (1996); *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995); *New York*, 505 U.S. at

---

(1995); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (per curiam); *Muhammad v. City of New York*, 904 F.Supp. 161, 187 (S.D.N.Y. 1995); *Alameen v. Coughlin*, 892 F. Supp. 440, 447 (E.D.N.Y. 1995); *Francis v. Keane*, 888 F. Supp. 568, 574-75 (S.D.N.Y. 1995); *Campos v. Coughlin*, 854 F. Supp. 194, 205 (S.D.N.Y. 1994).

[6] The Supreme Court recently granted certiorari in a case addressing the issue of Congress's power to commandeer the states to its policy ends. *See Printz v. United States*, No. 95-1478, *cert. granted*, 1996 WL 122493 (June 17, 1996).

156-157 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991). As this Court stated in *New York*, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *New York*, 505 U.S. at 162 quoting *Texas v. White*, 7 Wall. 700, 725 (1869).

In its zeal to advance religious liberty, Congress has transgressed this key structural constitutional feature—federalism—that was itself intended to ensure liberty by limiting concentrations of power. There are many constitutionally acceptable roads to religious freedom: particularized legislative exemptions in federal and state law based on specific legislative factfinding demonstrating that legislative intervention is necessary,[7] a congressional pledge (accompanied by appropriate efforts) to meet the highest ideals of religious liberty through the exercise of its various enumerated powers,[8]

---

[7] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L. J. 65, 94 n.121 (1996) (citing James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 (1992)) for the fact that there are up to 2,000 statutory accommodations of religion in state and federal law). The *Smith* decision, which refused to grant an exemption for peyote use by American Indians was followed by a variety of state statutes providing exemptions banning its use. In fact, thirteen states exempt religious use of peyote from criminal sanction. *See* Ariz. Rev. Stat. Ann. § 13-3402(B)(1) (1981) (providing that the religious use of peyote is a defense in prosecutions of drug offenses); Colo. Rev. Stat. Ann. § 18-18-418(3) (1992) (exempting peyote from criminal sanction if used in religious ceremonies of any bona fide religious organization); Idaho Code § 37-2732A (1991) (permitting the sacramental use of peyote); Iowa Code Ann. § 124.204(8) (1994) (same); Kan. Stat. Ann. § 65-4116(c)(8) (1987) (same); Minn. Stat. Ann. § 152.02(4) (1987) (same); Nev. Rev. Stat. § 453.541 (1973) (same); N.M. Stat. Ann. § 30-31-6 (1978) (same); Or. Rev. Stat. § 475.992(5) (1995) (same); S.D. Codified Laws § 34-20B-14(7) (1994) (same); Tex. Code Ann. § 481.111 (West 1989) (same); Wis. Stat. Ann. § 161.115 (West 1972) (same); and Wyo. Stat. § 35-7-1044 (1977) (same).

[8] "No constitutional principle . . . hinders Congress from pledging to meet the highest ideals of religious liberty through its various exer-

and vigorous enforcement of relevant provisions in state constitutions.[9] With RFRA, Congress has overstepped the bounds of its legitimate constitutional powers and made real the "fear of legislative usurpation" that animated the Framers' pivotal decision to institute a government of limited powers. Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 32 (1983). " 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." ' " *Gregory*, 501 U.S. at 458 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)). In the end, this case is not about religious liberty but rather about the power of Congress to alter the Constitution's liberty-preserving structure.

Fortunately, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

Congress has done in RFRA what—in our constitutional scheme—only the states may do themselves. Without question, the states voluntarily could protect religious liberty more robustly than the federal constitution through their own constitutions or through legislative action. *See Wisconsin v. Miller*, No. 94-0159 (Wis. June 20, 1996); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 725 (N.J. 1975); *see also supra* note 9. But *Congress*

---

cises of its enumerated powers." Gressman & Carmella, *supra* note 7, at 140-41 (quoting Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 369 (1994)).

[9] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. Rev. 275; and William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

may not curtail state and local government lawmaking by forcing the states to observe a higher standard of religious liberty than the Court has deemed the Constitution requires. *New York*, 505 U.S. at 161-65; *EEOC v. Wyoming*, 460 U.S. 226, 259-63 (Burger, C.J., dissenting) (1983); *but see Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

Because of its expansive sweep, RFRA colors every dealing a state or municipality has with every religious believer, church, or religious organization. It has launched a veritable avalanche of litigation. After almost three years in operation, RFRA has been the subject of over 200 cases decided in the federal courts and over three dozen cases decided in the state courts. Reported decisions, of course, are only the tip of the iceberg; countless other RFRA motions and unreported decisions invisibly stand behind this busy RFRA docket.

The additional burden generated by RFRA has fallen heavily upon already-strapped state and municipal governments and courts, as it has called into question the enforcement of neutral, non-discriminatory regulations as diverse as local zoning ordinances, public school and highway safety statutes, and fair employment and public accommodation statutes.[10] RFRA has caused an explosion of litigation by prisoners against the thousands of departments of corrections around the country, both state and federal.[11] That burden has been made heavier by the uncertainty of RFRA's constitutionality.

The lower courts are split on RFRA's constitutionality as applied to state law. Although this Court in some cases might

---

[10] *See, e.g., Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995), *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, *cert. denied*, 115 S. Ct. 460 (1994); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909 (Cal. 1996).

[11] *See, e.g., Lawson v. Singletary*, No. 94-4663, 1996 WL 280447 (11th Cir. May 29, 1996); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996); *Jolly*, 76 F.3d 468; *Hamilton*, 74 F.3d 1545; *Werner*, 49 F.3d 1476; *Akbar-El v. Muhammed*, 663 N.E.2d 703 (Ohio App. 1995). *See generally*, James C. Wilson, *RFRA: More Harm Than Good*, June 1996 Corrections Today 21.

be inclined to await a full-fledged split in authority, *see* Sup. Ct. R. 1, 10. RFRA's expansive impact and its patent unconstitutionality demand review at this time.[12] Indeed, the difficult task of interpreting RFRA has already generated a variety of splits in authority on statutory interpretation questions for which RFRA's constitutionality is an antecedent question.[13] By waiting, the Court leaves state and local governments at the mercy of myriad RFRA claims governed under uncertain, vague, and contested statutory standards.

An ample airing of views on RFRA's constitutionality has already occurred in the cases and the legal literature. Given RFRA's novelty and breathtaking sweep, lower court consensus on its scope or constitutionality will not happen. Because this Court has not had occasion to address with any specificity the relationship between Section 5 and the constitutional requirement of state autonomy, even those jurists in the lower courts addressing the question of RFRA's constitutionality as applied to state law and reaching similar conclusions have employed a variety of different rationales. Compare *Flores v. City of Boerne, Texas*, 73 F.3d 1352 (5th

---

[12] Given the significant number of RFRA cases pending in the courts of appeals and the state courts of last resort, there may well be a split in authority, per Sup. Ct. R. 10(a), on the issue of RFRA's constitutionality by the time the Court considers this petition. In any event, a Rule 10 split in authority is not the sine qua non for Supreme Court review. The Court has seen fit to grant certiorari in many important cases even though a split was not present. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *New York v. United States*, 505 U.S. 144 (1992); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

[13] *Mack*, 80 F.3d 1175 (split on meaning of substantial burden); *In re Young*, 82 F.3d 1407, 1419-20 (8th Cir. 1996) (split on meaning of compelling interest in bankruptcy context); *see also Meyer v. Federal Bureau of Prisons*, No. 95-02263 (CRR), 1996 WL 284868 (D.D.C. May 24, 1996) at *2 (split on whether RFRA waives Eleventh Amendment sovereign immunity); *Gilmore-Bey v. Coughlin*, No. 93-6592 (CLB), 1996 WL 306762 (S.D.N.Y. June 5, 1996) at *2 (same).

Cir. 1996) (holding RFRA constitutional and rejecting arguments that it violates separation of powers, the Tenth Amendment, and Section 5 power), *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1432 (W.D. Wis. 1995) (rejecting argument that Congress overstepped its constitutional bounds in passing RFRA); and *Belgard v. State of Hawaii*, 883 F. Supp. 510 (D. Hawaii 1995) (holding that RFRA is constitutional because Congress did not prescribe a rule for decision, but sought to protect free exercise to an extent greater than the Supreme Court has interpreted the Constitution to require); with *Keeler v. Mayor & City Council of Cumberland*, No. Civ. A. S-96-167, __ F. Supp. __, 1996 WL 311701 (D. Md. June 10, 1996) (holding that RFRA violates the constitutional separation of powers by requiring the courts to employ a standard of judicial review for First Amendment cases which has been explicitly rejected by the Supreme Court); *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir. 1996) (McMillian dissenting) (arguing that RFRA is unconstitutional as beyond Congress's Section 5 power); *Smith v. Fair Employment & Housing Comm'n*, 913 P.2d 909, 937 (Cal. 1996) (Mosk, J., concurring) (asserting that RFRA requires a court to determine the degree religious conduct is central to a person's religious beliefs in order to decide whether the government has substantially burdened free exercise and is therefore constitutionally forbidden); and *Flores*, 877 F. Supp. 355 (1995) (holding RFRA unconstitutional as a violation of the separation of powers doctrine). *See also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (holding RFRA constitutional as applied to federal law); *In re Tessier*, 190 B.R. 396 (Bkrtcy. D. Mont. 1995) (holding that RFRA violates separation of powers doctrine by requiring courts to employ a balancing test the Supreme Court found unworkable in *Smith*); *In re Young*, 82 F.3d 1407, 1421 n.1 (1996) (Bogue, S.D.J., dissenting). In addition, commentators have produced a landslide of articles, proposing a panoply of theories, many of which weigh against RFRA.[14]

---

[14] *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995) (arguing RFRA is unconstitutional because it violates the sepa-

In light of the heavy burden imposed by RFRA on state and local governments, the fact that almost three years have

ration of powers doctrine); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995) (arguing RFRA is unconstitutional because it violates the doctrine of incorporation and is inconsistent with the framers' intent that the first amendment be a disability applicable to Congress); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39 (1995) (discussing how RFRA circumvents the process of constitutional amendment and exceeds congressional power by infringing upon the reserved power of the states); Hamilton, *supra* note 1 (arguing that RFRA is unconstitutional as a violation of the doctrine of enumerated powers); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247 (1994) (arguing that RFRA is unconstitutional because it violates the Establishment Clause; and that Congress exceeded its Section 5 powers); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994) (arguing that RFRA violates principles of federalism and the Establishment Clause); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 131 (1996) (arguing that RFRA violates separation of powers doctrine); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171 (1995) (arguing for a narrow construction of RFRA to save it from invalidation on federalism grounds); *but see* Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. Rev. 73 (supporting RFRA as clarification of free exercise jurisprudence, and claiming broad Section 5 legislative power); Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 Harv. J.L. & Pub. Pol'y 181 (1992) (urging that Congress overturn *Employment Div. v. Smith* under its Section 5 power); Douglas Laycock & Oliver S. Thomas, *Interpreting The Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994) (arguing RFRA is constitutional and discussing how courts should enforce RFRA consistent with its vision of religious freedom accommodation); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994) (exploring RFRA interpretive issues and encouraging a standard affording broad protection for religious freedom); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996) (arguing that RFRA poses federalism issues but is constitutional as a legislative exercise of Section 5 power); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can*

already passed since its enactment, and the ever-expanding RFRA docket in both federal and state courts, we strongly urge this Court to grant certiorari on the issue of RFRA's constitutionality at this time.

This case is the appropriate vehicle for that inquiry. The constitutional issue was appropriately raised and carefully briefed below, before both the district court and the court of appeals. Both courts squarely addressed the issue, answering the question in opposite ways. *Flores*, 73 F.3d at 1362 (holding RFRA constitutional); *Flores v. City of Boerne*, 877 F. Supp. 355, 357-58 (W.D.Tex. 1995) (holding RFRA unconstitutional).

This case also offers a particularly good set of facts on which to test the appropriate limits federalism places on the scope of Section 5. Laws governing land use are of intense and substantial local concern. "Respect for local landmark laws is founded on principles of federalism." Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598, 1624 (1992). Thus, the enforcement of historic preservation law has been a matter left almost entirely to state and local governments, with supporting legislation from the federal government. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See generally*, Jane Papademetriou Kourtis, Comment, *The Constructive Trust: Equity's Answer to the Need for a Strong Deterrent to the Destruction of Historic Landmarks*, 16 B.C. Envtl. Aff. L. Rev. 793, 798-804 (1989).

RFRA's tests of compelling interest and least restrictive means skew the balance of power between local governments and churches on land use issues, including preservation and zoning issues, to the detriment of local autonomy. *Civil Liberties for Urban Believers v. City of Chicago*, 1996 WL 89241 (N.D. Ill. Feb. 27, 1996). Before *Smith*, 494 U.S. 872, the

---

Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment, 141 U. Pa. L. Rev. 1029 (1993) (suggesting RFRA is well within Congress's Section 5 power).

lower courts applied a variety of standards in zoning disputes involving churches. *See, e.g., Islamic Cent. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 299, 303 (5th Cir. 1988) (requiring a showing that the statute was "narrowly drawn in furtherance of a substantial government interest" and holding the ordinance unconstitutional because of city's failure to "show the importance of its purpose or that it could not have been accomplished by means less burdensome"); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 305, 307 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) (indicating that the level of scrutiny changes from "rational basis" to "compelling interest" where there is a significant burden on religious conduct and holding the ordinance in question constitutional under the former test upon a finding of an "indirect financial burden"); *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 741 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984) (applying a balancing test and finding the city's "substantial interest" outweighed the burden on free exercise); *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (applying a three-part test including a compelling interest requirement and holding that city had "strong interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods"). Following *Smith*, 494 U.S. 872, and its relaxed Free Exercise standard, cities tended to prevail in zoning disputes involving property devoted to religious purposes. *See, e.g., First Assembly of God, Inc. v. Collier County, Fla.*, 20 F.3d 419, *modified*, 27 F.3d 526 (11th Cir. 1994); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *South Ridge Baptist Church v. Industrial Comm'n of Ohio*, 911 F.2d 1203 (6th Cir. 1990). The standard in RFRA requires more of municipalities than either *Smith*, 494 U.S. 872, or even many of the pre-*Smith* cases would have.

In a context of traditional state power, this case squarely presents the question whether Congress may dictate to state and local governments to accommodate religious conduct more than the Constitution requires.

B. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Separation of Powers Doctrine

As this Court recently stated, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, No. 94-1966, 1996 WL 287732 (June 3, 1996) at *6 (citing *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)). The Supreme Court is "the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison*, 1 Cranch, at 177," particularly when the Court is exercising its constitutional authority to interpret the Bill of Rights. *Lopez*, 115 S. Ct. at 1639-40 (Kennedy, J., concurring); *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). In the words of Alexander Hamilton:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Federalist No. 78 *in* The Federalist Papers 229 (Roy P. Fairfield ed. 1981). *See also Oregon v. Mitchell*, 400 U.S. 112, 205 (1970) (Harlan, J., concurring in part and dissenting in part) ("[To] allow a simple majority of Congress to have final say on matters of constitutional interpretation is . . . fundamentally out of keeping with the constitutional structure."). RFRA, which is a straightforward repudiation of this Court's decision in *Smith*, 494 U.S. 872, violates this fundamental, "structural" constitutional principle. *See Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 (1995); *see also* U.S. Const. art. I, § 1; art. III, § I.

RFRA is Congress's unilateral declaration that the Free Exercise Clause requires much more than the Court declared it required in *Smith*. This reading of RFRA is amply supported by its language:

> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; . . .
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; . . .

42 U.S.C. § 2000bb.

"[T]he language of these findings portrays Congress, not as a political organ well-suited to conduct the business of empirical research and policy implementation, but as a super-Supreme Court." *Hamilton*, 74 F.3d at 1566. This understanding of RFRA is further supported in the legislative history. *See* The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2 (1990) (opening remarks of Rep. Edwards) (noting that "[RFRA] responds to Employment Division v. Smith, a recent Supreme Court ruling that weak-

ened the long-held standard of review for religious freedom cases"); *id.* at 11 (statement of Rep. Sensenbrenner, Jr.) (Declaring RFRA's purpose to reinstate the compelling interest test that had been the law for 25 years prior to Smith); *id.* at 28-29, 31-32, 35 (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) (observing that the purpose of RFRA is to reinstate the compelling interest test recently dropped by the Supreme Court); *id.* at 49, 51 (statement of Rev. John H. Buchanan Jr., Chairman, People for the American Way Action Fund) (noting the breadth of support for RFRA because "it seeks to protect the fundamental principle of religious freedom which was indeed undermined by the Supreme Court in the Smith decision"); 139 Cong. Rec. E1216 (daily ed. May 11, 1993) (statement of Rep. Margolies-Mezvinsky) (stating that RFRA corrects *Smith*, "which severely limits" religious freedom); 138 Cong. Rec. E617 (daily ed. March 11, 1992) (statement of Rep. Edwards) (stating that RFRA "will undo the damage inflicted on the right of religious free exercise" created by the Court's decision in Smith); 137 Cong. Rec. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz) (observing that RFRA would "reverse the disastrous effects of a dastardly and unprovoked attack on our first freedom by the Supreme Court"). "RFRA's imposition of the compelling interest test on all free exercise claims is nothing less than a radical alteration of the Supreme Court's free exercise jurisprudence." *Hamilton*, 74 F.3d at 1567 (McMillian, J., dissenting).

RFRA's defenders have attempted to justify it as merely a statutory right, rather than the attempted constitutional revision that it is. Yet, as the court of appeals explicitly declared in this case, the notion

> that Congress has created a statutory right is facile and ultimately incomplete. . . . We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*.

Flores, 73 F.3d at 1361. "[D]espite the *prima facie* plausibility of the Siren notion that RFRA does not interpret the First

Amendment but merely protects free exercise rights by statute, the argument has no substance." It is, in a word, "sophistry." *Keeler*, 1996 WL 311701, at *7, *8. As the District Court held in this case, Congress may not interpret the Bill of Rights at odds with this Court's interpretation. *See Flores*, 877 F. Supp. at 356-57 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)).

Some have argued that *Morgan*, 384 U.S. 641, provides support for the proposition that Congress may, pursuant to Section 5 of the Fourteenth Amendment, "ratchet" constitutional liberties beyond what the Court has required. This theory, however, is fundamentally at odds with *Marbury*. As the court of appeals noted, in the conflict between Section 5 and other constitutional limitations, Section 5 power must give way: "if RFRA violates other constitutional provisions, it exceeds Congress' Section 5 authority." *Flores*, 73 F.3d at 1361. Predictably, the ratchet theory "has never been revisited, followed, or clarified by the Court," Gressman & Carmella, *supra* note 7, at 131; *see also* Conkle, *supra* note 14, at 59, and deserves to be definitively laid to rest by this Court. *See* Sec. II, *infra*. As discussed more fully below, this Court should grant certiorari in this case for that purpose.

C. The Fifth Circuit's Decision Upholding RFRA Conflicts with this Court's Establishment Clause Doctrine

By privileging religion over all other expressions of conscience, the Religious Freedom Restoration Act violates the Establishment Clause. *See generally Lawson v. Singletary*, No. 94-4663, 1996 WL 280447 (11th Cir. May 29, 1996) at *8 n.2. As this Court recently reaffirmed in *Rosenberger v. Rector & Visitors of Univ. Of Va.*, 115 S. Ct. 2510, 2521 (1995), governments are required to exercise neutrality toward religion. RFRA utterly lacks the "secular purpose" required under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Indeed, the language of RFRA and its legislative history are a log of Congress's decision to privilege religion over all

other types of beliefs and to meddle with the religious life of this nation. *See* 42 U.S.C. § 2000bb (Purpose); H.R. Rep. No. 88, 103d Cong., 1st Sess. 14 (1993) (RFRA was intended to implement the Free Exercise Clause—to protect religious freedoms and to eliminate legislation that obstructed the free exercise of religion.).[15]

II. THE SCOPE OF CONGRESSIONAL POWER TO REVISE THE BILL OF RIGHTS PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Supreme Court bears responsibility to delineate the constitutional scope of congressional power to legislate. *See United States v. Lopez*, 115 S. Ct. 1624 (1995) (Kennedy, J., concurring). As then-Justice Rehnquist has stated,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome v. United States, 446 U.S. 156, 207 (1980) (Rehnquist, J., dissenting). The scope of Congress's power under Section 5 of the Fourteenth Amendment has not been set-

---

[14] Ironically, Congress stated in RFRA that it was not intended to alter existing Establishment Clause jurisprudence.

> 42 U.S.C. § 2000bb-4. Establishment clause unaffected:
>
> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

tled by this Court. Even in the area of racial discrimination, which is the core concern of the Fourteenth Amendment, and which has afforded this Court a significant number of opportunities to address Section 5's scope, this Court has yet to reach a consensus in a majority opinion. As the Court stated in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2114 (1995), "various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority."

Although the Court increasingly has exercised its responsibility to draw the line on congressional power, *see New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Lopez*, 115 S. Ct. 1624; *Adarand*, 115 S. Ct. 2097; and *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), and has thereby constructed the foundation that supports a holding that RFRA exceeds Congress's constitutional authority, the Court has not clarified the full extent to which state sovereignty is an intrinsic limitation on the exercise of Section 5 powers.

RFRA was passed by Congress solely on the premise that *Morgan*, 384 U.S. 641, authorizes Congress unilaterally to expand the scope of incorporated rights against the states. *See Keeler v. Mayor*, 1996 WL 311701, at *4. In effect, RFRA's proponents argue that federalism places no meaningful limits on the exercise of Section 5 authority. To the contrary, the Court's "cases are quite clear that there are real limits to federal power." *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

RFRA's defenders have engaged in an overbroad reading of *Morgan* that tips "the scales too far" and is contrary to the basic structure of our federalist union. *See Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring); *see also Gregory*, 501 U.S. 452; *New York*, 505 U.S. 144. *Morgan* arguably stands for two propositions, one of which is unremarkable, the other more controversial. First, Congress may provide remedies for con-

stitutional infractions by the states. *Morgan*, 384 U.S. at 648. This straightforward principle follows directly from the language of Section 5, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This remedial power may also be read to imply that Congress may—if necessary—enact prophylactic legislation demanding more than the Constitution requires where state and local governments have proved recalcitrant to the requirements of the Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989). At most, Congress's prophylactic power could permit Congress to exercise its legislative factfinding capacity to determine that the states and local governments have proved recalcitrant to the Constitution and to institute means of bringing them back within the constitutional fold. "The enactment of RFRA can in no sense be said to involve the 'specially informed legislative competence' of Congress." *Keeler*, 1996 WL 311701, at *11. In fact, "Congress abdicated its responsibility to investigate the particular state action which might have the potential of unconstitutionally burdening the free exercise of religion." *Hamilton v. Schriro*, 74 F.3d 1545, 1567 (8th Cir. 1996) (McMillian, J., dissenting).

Even under the prophylactic theory of *Morgan*'s first rationale, the Court has never placed its imprimatur on congressional action that extends constitutional boundaries against the states in the absence of a history of state recalcitrance to the constitutional standard. Unlike the Voting Rights Act, which is the repeated reference offered in support of RFRA, RFRA was not necessitated by a refusal by state and local governments to abide by the Constitution, thereby requiring prophylactic legislation. With regard to the Voting Rights Act, the Court has stated:

> Two points emerge vividly from the voluminous legislative history of the [Voting Rights] Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in

> certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

South Carolina v. Katzenbach, 383 U.S. 301, 309, 337 (1966); *see also Shaw v. Reno*, 509 U.S. 630 (1993); *Rome*, 446 U.S. at 182; *Gaston County, N.C. v. United States*, 395 U.S. 285 (1969). What "Congress has done through RFRA's passage under the banner of § 5 is dramatically different from its exercise of § 5 power in *Morgan* or in any other case to date." *Hamilton*, 74 F.3d at 1568 (McMillian, J., dissenting).

Neither the legislative history of RFRA nor any other identified source supports the position that state and local governments persistently and intentionally have refused to abide by the constitutional standard as set out in either *Smith* or the pre-*Smith* case law. The RFRA legislative history is replete with denigrations of *Smith* but only sporadically dotted with a limited number of anecdotal reports of religious suppression. RFRA is not a constitutionally legitimate prophylactic measure; rather, it is an extreme overenforcement of Section 5. *See Hamilton*, 74 F.3d at 1570 (McMillian, J., dissenting) ("This is not prophylaxis but unconstitutional interbranch hegemony.") RFRA is an aggrandizement of congressional power over and against the Supreme Court and in derogation of the states.

The *Morgan* decision's second, controversial rationale, the so-called "ratchet theory," would permit Congress to expand but not contract Fourteenth Amendment rights. *Morgan*, 384 U.S. at 651 n.10. This latter basis for the *Morgan* decision has proved to be a derelict on the waters. Gressman & Carmella, *supra* note 7, at 131; *see also* Conkle, *supra* note 14, at 67. The ratchet theory violates separation of powers principles as it permits Congress to overtake the core judicial function to declare "what the law is," as set forth in *Marbury v. Madison*,

1 Cranch (5 U.S.) 137 (1803). It was rightly and roundly criticized by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor in *Wyoming*, 460 U.S. 226 (Burger, C.J., dissenting), who stated that "[a]llowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.* at 262. Far from being vindicated, the ratchet theory was laid to rest in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which demarcated "a limitation on the extent to which Congress may substitute its own judgment for that of the states and assume this Court's 'role of final arbiter.' " *Wyoming*, 460 U.S. at 262; *see also* Conkle, *supra* note 14, at 52 ("*Morgan*'s theory of substantive congressional power must be regarded as suspect.").[16] The Court should grant certiorari in this case for the purpose of explicitly interring the ratchet theory of congressional power, which is in significant tension with this Court's views on federalism and separation of powers.

Contrary to the views of RFRA's proponents, who would distort Section 5 into a blank check for the exercise of congressional power against the states, Congress may not ignore principles of federalism when it exercises its Section 5 powers. Rather, federalism principles provide innate limitations on the exercise of Section 5 power. As this Court declared in *New York*, 505 U.S. at 159 per Justice O'Connor:

> just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the lim-

---

[16] The uncertain status of *Morgan*'s ratchet theory has also been reflected in Congress. Sen. Orrin Hatch, who is one of RFRA's staunchest supporters, refused to vote in favor of the Human Life Bill on the grounds that it overturned *Roe v. Wade*, 410 U.S. 113 (1973), and therefore exceeded congressional authority under Section 5 of the Fourteenth Amendment. He stated that the only constitutional source for the bill was *Morgan* and he believed that *Morgan* was wrongly decided. Staff of Subcomm. on Separation of Powers of Senate Comm. on the Judiciary, 97th Cong., 1st Sess., Report on Human Life Bill, S. 158, Together with additional and minority views 35 (Comm. Print 1981).

> its of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether [the Act] oversteps the boundary between federal and state authority.

One year earlier, this Court stated in *Gregory v. Ashcroft* that "the Fourteenth Amendment does not override all principles of federalism." 501 U.S. at 469. The history of the Fourteenth Amendment makes it abundantly clear that "its framers rejected the option of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions." Alexander Bickel, *The Voting Rights Act Cases,* 1966 Sup. Ct. Rev. 75, 97.

RFRA's scope and content also require that the Court provide guidance as to the scope of Congress's Section 5 power as it relates to rights incorporated into the Fourteenth Amendment. This Court has never addressed this question.[17] *See Hamilton*, 74 F.3d at 1563 (1996) (McMillian, J., dissenting). Even if this Court were inclined to read the *Morgan* decision as providing an expansive ratchet power to Congress, the *Morgan* decision and the other Voting Rights Act cases speak only to Congress's power vis-a-vis the Equal Protection Clause. They say nothing of congressional power to "ratchet" rights incorporated into the Fourteenth Amendment from the Bill of Rights. The original purpose of the Fourteenth Amend-

---

[17] The one case implicating Section 5 and incorporated rights is *Hutto v. Finney*, 437 U.S. 678 (1978). *Hutto* provides no guidance on RFRA, however, because it simply permits Congress to provide a remedy for constitutional evils identified by the Court. It does not raise the distinct and more troubling problem posed by RFRA: Congress invoking its Section 5 powers to require local governments to accommodate religious liberty more than the Constitution requires. The treatment to be accorded incorporated rights under Section 5 was not addressed by the Court of Appeals below, on the ground that the issue more properly should be addressed to the Supreme Court. *Flores v. City of Boerne, Texas,*, 73 F.3d 1352, 1358 (5th Cir. 1996).

ment was to empower Congress and the courts to eliminate state-sponsored racial discrimination. The Bill of Rights, by contrast, was designed to limit Congress itself. *See* Hamilton, *supra* note 1, at 361-64; *see also* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539, 1582, 1595 (1995).

There is strong reason to provide Congress more latitude with respect to enforcing social equality than with respect to incorporated individual rights. *See Richmond*, 488 U.S. at 522-23 (Scalia, J., concurring); *Hutto v. Finney*, 437 U.S. 678, 717-18 (1978); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). The lower courts have no direct Supreme Court guidance on this difficult issue directly raised by RFRA and therefore would benefit from direction by this Court.

This Court should grant certiorari in this case to embrace its constitutional responsibility to delineate the constitutional limits on Congress's exercise of its Section 5 authority, to address the vitality of the ratchet theory, and to correct the serious misstep that Congress has taken with RFRA in derogation of the states.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, or, in the alternative, hold this case for determination of *Printz v. United States*, No. 95-1478, *cert. granted*, 1996 WL 122493 (June 17, 1996).

Respectfully submitted,

Marci A. Hamilton, Esq.
482 Kings Road
Yardley, Pennsylvania 19067
(215) 493-1973
Counsel of Record

Lowell F. Denton, Esq.
DENTON, MCKAMIE
& NAVARRO
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205
(210) 227-3243

Gordon L. Hollon, Esq.
101 N. Saunders
Boerne, Texas 78006
(210) 249-2521

Attorneys for Petitioner
City of Boerne, Texas

Dated: June 25, 1996

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50306

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Plaintiff-Appellant,

—and—

UNITED STATES OF AMERICA,
Intervenor-Plaintiff-Appellant,

—versus—

CITY OF BOERNE, TEXAS,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, EMILIO M. GARZA, and BENAVIDES,
Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

The City of Boerne, Texas, contends that Congress lacks the authority to enact the Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, 42 U.S.C. § 2000bb et seq. The district court agreed. We are persuaded that the act is constitutional and reverse.

I.

The Saint Peter Catholic Church in Boerne, Texas, was built in 1923. In 1991, the Archbishop of San Antonio, Bishop Flores, authorized the parish to build a larger facility.

Some months later, the City of Boerne enacted Ordinance 91-05 in order to "protect, enhance and perpetuate selected historic landmarks" and to "safeguard the City's historic and cultural heritage." The Ordinance authorized the City's Historic Landmark Commission to prepare a preservation plan with proposed Historic Districts. The City Council adopted the Landmark Commission's proposal for designating a Historic District. Saint Peter was not designated as a historic landmark but at least part of the church was included within the District. According to Archbishop Flores, the Historic District included only its facade, but the City considered the entire structure to be within the District.

In 1993, the church applied for a building permit from the City to enlarge the church building, urging that its proposed addition did not affect the church's facade. The Landmark Commission denied the permit application, and the City Council, in turn, denied the church's appeal. The church filed this suit seeking a judicial declaration that the Ordinance was unconstitutional and violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., injunctive relief, and attorneys' fees.

The City's first mention of constitutionality came in a Proposed Joint Pre-trial Order asserting that "any interpretation or application of the Religious Freedom Restoration Act of 1993 which imposes a statutory revision in the applicable standards of First Amendment jurisprudence is not valid . . .

taking into account the operative provisions of Article III, the Free Exercise Clause of the First Amendment, Section 5 of the Fourteenth Amendment, and the Tenth Amendment." Over the church's objection, the district court granted the City leave to amend its answer to plead the unconstitutionality of RFRA as asserted in the pre-trial order.

The district court held that RFRA was facially invalid because it infringed on the authority of the judiciary "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The district court reasoned that "Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA." It was also persuaded that Congress had not invoked its power under Section 5 of the Fourteenth Amendment in enacting RFRA. The district court certified its order for interlocutory appeal to this court pursuant to 28 U.S.C. § 1292(b) and entered a partial final judgment under Fed. R. Civ. P. 54(b). The United States and the church appealed and petitioned for leave to appeal. We have jurisdiction.

II.

A.

Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), held that the First Amendment's Free Exercise Clause does not bar application of a facially neutral, generally applicable law to religiously motivated conduct. *Id.* at 881. Five months after *Smith*, Congress conducted its first hearing on a legislative response, the Religious Freedom Restoration Act of 1990. *See*, Hearing Before the Subcomm. on Civil and Constitution Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (hereinafter "1990 House Hearing"). The 101st Congress did not pass the bill, but it was reintroduced in the 102nd Congress, S. 2969, 102nd Cong., 1st Sess. (1991); H.R. 2797, 102nd Cong., 1st Sess. (1991), and again in the 103rd Congress. S. 578, 103rd Cong., 1st. Sess. (1993); H.R. 1308, 103rd Cong., 1st Sess. (1993).

B.

In enacting the Religious Freedom Restoration Act of 1993, Congress mandated that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government demonstrates that application of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA applies both to Federal and State law, whether enacted before or after RFRA became effective. 42 U.S.C. § 2000bb-3(a).

Congress found that "governments should not substantially burden religious exercise without compelling justification," and decried the Supreme Court's decision in *Smith*, asserting that it "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). The Act's stated purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

III.

A.

Congress considered its constitutional authority to enact legislation to overturn *Smith*. *See* 1990 House Hearing at 51 (statement of Rev. John H. Buchanan, Jr.). Scholars critical of *Smith* found in Section 5 of the Fourteenth Amendment authority to enact RFRA. *See id.* at 51, 54 (statement of Rev. John H. Buchanan, Jr.), 72-79 (letter from Douglas Laycock); Congressional Research Service, The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis 30-31 (1992) (prepared by David Ackerman). Later hearings continued the study of Section 5 and the support it

would offer to such legislation. *See* Religious Freedom Restoration Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102nd Cong., 2d Sess. 353-59 (1992) (statement of Douglas Laycock) (hereinafter "1992 House Hearings"); The Religious Freedom Restoration Act: Hearing Before the Senate Comm. on the Judiciary, 102nd Cong., 2d Sess. 92-97 (1992) (statement of Douglas Laycock) (hereinafter "1992 Senate Hearing").

Some thoughtful scholars questioned the authority of Congress under Section 5, at least as far as RFRA pushed it. *See, e.g.*, 1992 House Hearings at 385-94 (statement of Ira Lupu); 1992 Senate Hearing at 122-25 (statement of Bruce Fein). Congress ultimately believed that Section 5 of the Fourteenth Amendment granted it sufficient authority to enact the bill:

> Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. However, limits to congressional authority do exist. Congress may not (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision. Because [RFRA] is well within these limits, the Committee believes that in passing the Religious Freedom Restoration Act, Congress appropriately creates a statutory right within the perimeters of its power.

H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993). The Senate report expressed similar views, noting that RFRA "falls squarely within Congress' section 5 enforcement power."

S. Rep. 111, 103d Cong., 1st Sess. 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903.

When RFRA reached the Senate floor for debate, no Senator questioned Congress' power under Section 5. The Senators expressing a view on the issue were persuaded that Section 5 provided ample authority. *See* 139 Cong. Rec. S14469 (statement of Sen. Grassley); 139 Cong. Rec. S14470 (statement of Sen. Hatch).

B.

That the Executive and Legislative branches also have both the right and duty to interpret the constitution casts no shadows upon Justice Marshall's claim of ultimate authority to decide. The judicial trump card can be played only in a case or controversy. The power to decide the law is an incident of judicial power to decide cases. There is no more. A power of review not rooted in a case or controversy would impermissibly draw to Article III the interpretive role of the Executive and Legislative branches of government. So it is that the familiar recitation that Congressional legislation comes to us with a presumption of constitutionality is a steely realism and not merely a protocol of manners or an empty formalism.

No party here contends and we express no opinion whether other delegations of legislative power, such as the Commerce Power, provide constitutional authority for the passage of RFRA. RFRA's legislative history more than satisfies our requirement that "we be able to discern some legislative purpose or factual predicate that supports the exercise of [Congress' Section 5] power." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). There is no question that Congress drew on its power under Section 5 in enacting RFRA. The district court's doubt that it did is without basis. The issue is whether that authority was there.

IV.

The City contends that RFRA is unconstitutional for four related reasons. First, Congress lacked the authority to enact

the statute under Section 5 of the Fourteenth Amendment. Second, the statute violates the separation of powers by returning to the courts the task of accommodating general laws and religious practices after *Smith* denied the judiciary's competence to do so. Third, RFRA violates the Establishment Clause of the First Amendment. Fourth, it violates the Tenth Amendment. We turn to these contentions.

A.

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Thirteenth, Fourteenth, and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

The Supreme Court first considered the meaning of Section 5 in *Ex parte Virginia*, 100 U.S. 339 (1879). It upheld the constitutionality of an act prohibiting the disqualification of grand or petit jurors on account of race. *Id.* at 345, 346. The Court declined to read narrowly the power granted by Section 5:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

The civil rights legislation of the 1960's brought to court again questions regarding the power of Congress under the Civil Rights Amendments. In *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966), the Court rejected the argument that under Section 5 Congress could only prohibit acts that would violate the substantive provisions of the Fourteenth Amendment.

Referring to *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), the Court held that the inquiry into what is "appropriate legislation" under Section 5 is whether the statute "may be regarded as an enactment to enforce [the Fourteenth Amendment], whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.' " *Id.* at 651.

Six years later, the Court reaffirmed this reading of Section 5. In *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), the Court upheld congressional prohibitions of literacy tests in state and national elections. *Mitchell* did strike down the guarantee of the right of 18-year-olds to vote in state elections, 400 U.S. at 118, but that decision rested on the exclusive role of states in conducting their elections. Justice Black explained that Congress' enforcement power was broad but not unlimited:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.

Id. at 128-29 (opinion of Black, J.).

In the years since *Mitchell*, the Court has adhered to these generally stated principles. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court upheld, against a federalism-based

Eleventh Amendment challenge, the application of Title VII, 42 U.S.C. § 2000e et seq., to the States. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority." *Id.* at 456. Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a plurality of the Court expressed the view that Section 5 provided authority to remedy the effects of past discrimination, even though the Fourteenth Amendment only prohibited purposeful discrimination. *See id.* at 478 (opinion of Burger, C.J., joined by White and Powell, JJ.); *id.* at 500-02 (Powell, J., concurring). The Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2117 (1995), in holding that federal affirmative action programs are subject to strict scrutiny, did not question congressional power under Section 5. *Id.* at 2114.

The Thirteenth, Fifteenth, Eighteenth, Twenty-third, Twenty-fourth, and Twenty-six Amendments contain parallel grants of enforcement power to Congress. The Court has read those provisions in a similar fashion. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), the Court upheld provisions of the Voting Rights Act of 1965. Discussing Congress' power under Section 2 of the Fifteenth Amendment—which contains virtually identical language to Section 5 of the Fourteenth—the Court wrote that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* at 326. Quoting Chief Justice Marshall's opinion in *M'Culloch*, the Court explained:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with letter and spirit of the constitution, are constitutional.

Id. at 326 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Similarly, in *James Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924), the Court, addressing the scope of Congress' power under Section 2 of the Eighteenth Amendment, held that Congress "may adopt any eligible and appropriate means to make [the Eighteenth Amendment's] prohibition effective."

This continued adherence to the principle that Congress may explicate textually located rights and obligations pursuant to Section 5 persuades us that the three-part test from *Morgan* remains the benchmark.

1.

The first inquiry under *Morgan* is whether RFRA "may be regarded" as an enactment to enforce the Fourteenth Amendment. It has been long established that the Due Process Clause of the Fourteenth Amendment incorporates the Free Exercise Clause of the First Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

We disagree with the City's argument that Congress' Section 5 authority is more limited when it acts to enforce provisions other than the Equal Protection Clause. Section 5 does not place conditions on Congress' authority to enforce the amendment. Congress has the power to enforce "the provisions of this article," not just the Equal Protection Clause. *United States v. Price*, 383 U.S. 787, 789 & n.2 (1966) (noting Section 5 empowers Congress to enforce "every right guaranteed by the Due Process Clause of the Fourteenth Amendment"); *see also* Cong. Globe, 42d Cong., 1st Sess. App. at 83 (1871) ("The fourteenth amendment closes with the words, 'the Congress shall have power to enforce, by appropriate legislation, the provisions of this article'—the whole of it, sir; all the provisions of the article; every section of it.") (statement of Rep. Bingham). We reject the notion that there is any relevant hierarchy of constitutional rights within the Fourteenth Amendment. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989). At base, this

argument is little more than an invitation to revisit the incorporation of the First Amendment, an invitation addressed to the wrong court.

We think it beyond peradventure that Congress enacted RFRA to enforce the religious liberty protected from State infringement by the Due Process Clause. RFRA expressly declares its purpose "to restore the compelling interest test . . . and guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). The Act itself defines "exercise of religion" as that under the First Amendment. *See* 42 U.S.C. § 2000bb-2(4).

RFRA's legislative history leaves little room for doubt that Congress intended "to enforce the right guaranteed by the free exercise clause of the first amendment." S. Rep. 111 at 14 n.43, *reprinted in* 1993 U.S.C.C.A.N. at 1904. Witnesses at congressional hearings spoke eloquently of the need for legislation to defend individuals, particularly those from minority religions, from generally applicable laws that burden the exercise of religion. *See, e.g.*, 1992 House Hearings at 157-59 (statement of Edward Gaffney, Jr.); 1992 Senate Hearing at 5-6 (statement of William Nouyi Yang), 37-39 (statement of Dallin Oaks). Indeed, the Senate Judiciary Committee found the need for legislation to restore the pre-*Smith* compelling interest test in order "to assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897-98.

2.

The second inquiry under *Morgan* is whether RFRA is "plainly adapted to that end." Although Congress' power to enforce the Amendment is not confined to "abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional," *Morgan*, 384 U.S. at 648-49, Section 5 does not permit Congress to rewrite the scope of the Amendment's provisions out of whole cloth. Rather,

Congress' power under Section 5 is remedial. Congress' constitutional power to legislate pursuant to Section 5 is tied to Congress' superior ability to find and redress nascent or disguised violations of the Amendment. In short, "Congress may act only where a violation lurks." *E.E.O.C. v. Wyoming*, 460 U.S. at 260 (Burger, C.J., dissenting).

The United States offers three remedial justifications for RFRA: 1) RFRA deters governmental violations of the Free Exercise Clause; 2) RFRA prohibits laws that have the effect of impeding religious exercise; and, 3) RFRA protects the free exercise rights of adherents of minority religions. We address each in turn.

The United States urges that RFRA is an effective means of prohibiting the unconstitutional targeting of religion through facially neutral laws. According to this view of RFRA, *Smith*'s requirement that individuals show that a law is not facially neutral or generally applicable has not been an effective means of rooting out laws hostile to a religion in particular or to religion in general. RFRA responds by requiring all laws that substantially burden the exercise of religion to pass the compelling interest test, a test well-suited to separating well-intentioned statutes from invidious ones. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J.) (noting that purpose of strict scrutiny is to "smoke out" illegitimate uses of race).

Congress could have reasonably concluded that *Smith*'s focus on facial neutrality and general applicability has been ineffective in identifying laws motivated by antagonism to a religion or to religion in general. As one witness testified before the Senate Judiciary Committee, "formally neutral, generally applicable laws have repeatedly been the instruments of religious persecution, even in America." 1992 Senate Hearing at 71 (statement of Douglas Laycock). Moreover, Congress found that "[a]fter *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators." H.R. Rep. 88 at 6. These considerations, analogous to those underlying the Voting

Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, convince us that RFRA serves the remedial goal of identifying budding or disguised constitutional violations that would otherwise survive judicial scrutiny under *Smith*.

In a similar vein, the United States argues that even if the Constitution only prohibits governmental action taken with the intent of interfering with religious exercise, Congress may go farther, as it did with RFRA, and prohibit conduct that has the effect of burdening the exercise of religion. According to this view of RFRA, applying the compelling interest test to all laws, whether facially neutral or not, that have the effect of substantially burdening the exercise of religion is a prophylactic measure designed to ensure that government may not discriminate against a particular religion or religion in general. It is claimed to be an effective means of identifying both mature and sprouting constitutional violations, a prophylactic measure that prohibits some laws whose effect upon the free exercise of religion is so substantial that RFRA is fairly said to regulate incipient constitutional violations.

In cases involving racial discrimination, the Court has held that Congress may prohibit laws with a racially discriminatory effect, as it did in the Voting Rights Act of 1965, as an appropriate method of promoting the Amendment's purpose, even if the Constitution only prohibits laws with a racially discriminatory intent. *City of Rome*, 446 U.S. at 177. Similarly, Congress could reasonably conclude that prohibiting laws that have the effect of substantially burdening religion promotes the free exercise of religion. Congress heard much testimony regarding the severe burdens that facially neutral laws can impose on an individual's exercise of his religious beliefs. *See, e.g.*, 1992 House Hearings at 157-59 (statement of Edward Gaffney, Jr.) (discussing effect of *Smith* on various religious exercise).

A robust application of the compelling interest test may be uneven in exempting religious practices from statutes of general applicability and push courts into either an uncomfortable judging of the credibility of claims that practices are religious exercises or leaving each person a non-regulatable island unto

themselves, arguably concerns behind the pre-*Smith* timidity of its use. The concerns are large and, for some scholars, they are a compelling argument against RFRA. Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 452 (1994). But this begs the question of congressional power. That some generally applicable laws must yield their unwitting grasp of religious practices is the price Congress has chosen to pay to achieve its desired level of accommodation. "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations." *Morgan*, 384 U.S. at 653. "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.*

Finally, the United States claims that RFRA serves to protect religious minorities, thereby promoting the goals of both the Due Process Clause and the Equal Protection Clause. According to this view of RFRA, adherents of minority religions are disproportionately affected by facially neutral laws. Congress heard testimony regarding the effects of *Smith* on members of the Hmong, Jewish, Mormon, and Amish faiths. *See* 1992 Senate Hearing at 30-40; 1992 House Hearings at 104, 107-08, 406-09. Congress could reasonably conclude that more exacting scrutiny of facially neutral legislation that burdens a religious practice is needed to protect adherents of minority religions. *See* S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897.

Relatedly, Congress could reasonably conclude that seeking religious exemptions in a piecemeal fashion through the political processes, particularly at the state or local governmental level, would place minority religions at a disadvantage. *See* The Federalist No. 10 (James Madison). *Smith* acknowledged that leaving accommodation to the political processes risked discriminatory treatment but viewed it as an "unavoidable consequence of democratic government." 494 U.S. at 890. Congress considered the effect the *Smith* decision would have on minority religions seeking accommodations through the political process and concluded that "State and local legislative bodies cannot be relied upon to craft excep-

tions from laws of general application to protect the ability of the religious minorities to practice their faiths." S. Rep. 111 at 8, *reprinted in* 1993 U.S.C.C.A.N. at 1897; *see also* 1992 House Hearings at 326 (statement of Douglas Laycock).

These justifications fit within the remedial power of Congress under Section 5. To our eyes, Congress considered the need for "appropriate legislation" to enforce the provisions of the Fourteenth Amendment and responded with legislation that is "plainly adapted" to that end.

The third inquiry under *Morgan* is whether RFRA is consistent "with the letter and spirit of the constitution." This inquiry requires us to determine whether RFRA violates any other provision of the Constitution. Congress's power to remedy constitutional wrongs is a one-way street. Congress may not violate other constitutional provisions while enforcing those of the Fourteenth Amendment. *Morgan*, 384 U.S. at 656. The City claims that RFRA violates three Constitutional provisions: 1) the separation of powers; 2) the Establishment Clause; and 3) the Tenth Amendment.

The City treats these arguments as independent of its Section 5 argument: Even if Section 5 authorizes Congress to enact RFRA, it is unconstitutional for these additional reasons. However, as *Morgan* makes clear, Congress has no power under Section 5 to violate other individual rights. Stated another way, if RFRA violates other constitutional provisions, it exceeds Congress' Section 5 authority. We will address each separately.

B.

The district court agreed with the City that RFRA violates the separation of powers by displacing the authority of the judiciary, established by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "to say what the law is." RFRA accomplishes this goal, according to the City, by reversing *Smith* and restoring the pre-*Smith* judicial standard for evaluating free exercise claims. In effect, Congress has created a new constitutional right and achieved a "substantive expansion of First Amendment doctrine." In short, the City

describes RFRA as nothing less than a constitutional coup d'etat, declaring that "[t]he new order under RFRA would overrule *Marbury* and craft a new standard of constitutional responsibility." The United States responds that RFRA "is simply a statute that provides legislative protection for a constitutional right over and above that provided by the Constitution."

The response that Congress has created a statutory right is facile and ultimately incomplete. RFRA creates a statutory right to be sure. The origins and framing of that right, however, are drawn from judicial decisions construing the Constitution. We will not pretend that RFRA is anything but a direct response to the Supreme Court's decision in *Smith*. Indeed, Congress' announced purpose was "to 'turn the clock back' to the day before *Smith* was decided." H.R. Rep. 88 at 15 (statement of Rep. Hyde). Moreover, RFRA speaks in terms familiar to constitutional adjudication. To pass muster under RFRA, applicable laws must further a "compelling governmental interest" and be the "least restrictive means" of furthering that interest. This is a statutory rule, but it is a rule mandating a process rejected by the Court in *Smith*.

RFRA is also, in a sense, an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts—that is, strict scrutiny versus a form of intermediate scrutiny. This view includes an image of congressional second-guessing of the courts. But that sense is false. Congress by RFRA is demanding ad hoc review of laws of general applicability that substantially burden the free exercise of religion. This is functionally a regulation of nascent violations of the Free Exercise Clause, at least so long as the statutory trigger of *substantial* effect is given full force. It is true that the Court found that the Free Exercise Clause did not require the Court to accommodate laws of general applicability not aimed at a religious practice and that RFRA demands that the Court engage in an exercise that the Court has eschewed. Nonetheless, whether the courts must obey RFRA's command to do so turns only on the independent issue of the power of Congress under Section 5.

As we have otherwise explained, this is indistinguishable in any relevant way from the congressional command to examine election practices adversely impacting the voting strength of protected minorities, even though there was no purpose to discriminate and, hence, no violation of the Equal Protection Clause. Dispensing with the constitutionally rooted requirement that discrimination be purposeful is an extraordinary exercise of power. The insistence in *Washington v. Davis*, 426 U.S. 229, 239 (1976), upon proof of discriminatory purpose was a decision about the judicial role. At issue was whether the accent should be upon federal courts as arbiters of social justice or as a more passive arbiter of cases or controversies. The role of purpose becomes clear in the debate over its wisdom. *Compare* Laurence H. Tribe, American Constitutional Law § 16-20 at 1515 (2d ed. 1988) (urging that anti-subjugation should be test rather than purpose) *with* Patrick E. Higginbotham, Laurence Tribe's Visionary Theories of the Equal Protection Clause, 4 Benchmark 125, 131-34 (1990) (rejecting Tribe's view). The merits of that debate aside, it was common ground that dispensing with the requirement of *Washington v. Davis* that violations of the Equal Protection Clause must be purposeful works a large relocation of power. This is not to suggest that RFRA's dispensing with purpose is of a lesser magnitude. We doubt that it is. Rather, the point is that despite its large role, dispensing with purpose remains nonetheless an exercise of Congress' remedial power, the power to reach conduct that only threatens the free exercise of religion.

Undeniably, RFRA's origins and codification of terms drawn directly from constitutional decisions make it unusual and are characteristic of what is termed a "foundational statute." The critical question is whether they make RFRA unconstitutional. We think not.

The City's argument rests on the mistaken assumption that *Smith* describes not only how little the Government *must* accommodate religion but also how much it *may* accommodate it. Stated another way, the City must contend that *Smith* held not only that facially neutral laws having the incidental effect of burdening religion do not violate the Free Exercise

Clause but also that exemptions to such laws do violate either that clause or the Establishment Clause. Only if the latter proposition is true does RFRA usurp the judiciary's duty to interpret the Constitution.

This view of *Smith* has its supporters, *see* Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 450 (1994). Prior to *Smith*, the Court recognized that legislatures were free to enact religious exemptions more expansive and accommodating than that required by the Free Exercise Clause. *See Zorach v. Clauson*, 343 U.S. 306 (1952); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Even when the Court held that a particular religious accommodation violated the Establishment Clause, Justice Brennan cautioned that "we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (Brennan, J.).

Smith, however, did not change this rule. To the contrary, the Court contemplated "leaving accommodation to the political process:"

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. The Court noted with approval that several States, unlike Oregon, had exempted the sacramental use of peyote from their drug laws. *Id.*

Since *Smith*, the Court has reaffirmed that religious accommodations are constitutional. "Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2492 (1994). Rather, " 'government may (and sometime must) accommodate religious practices . . . .' " *Id.* (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987)).

The City's separation of powers argument challenges this well-established rule. Every legislatively mandated accommodation of religion reflects a legislature's judgment regarding the free exercise of religion. RFRA does not usurp the judiciary's authority to say what the law is any more than did the Voting Rights Act of 1964 when it prohibited literacy tests after *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), had upheld their constitutionality. Nor does RFRA usurp the judiciary's interpretive powers any more than did the American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125, which overturns the particular result of *Smith* by preventing States from prohibiting Native Americans from using peyote as part of their religious practices. *See* 42 U.S.C. § 1996a(b)(1).

That RFRA speaks in broad generalities where other legislatively mandated religious exemptions, such those provided by the American Indian Religious Freedom Act, address specific conduct is of no moment. Within the area of permissible legislative accommodations of religion, Congress may paint with a broad or narrow brush. In either situation, Congress has "disagreed" with the judiciary regarding the scope of religious freedom and the Free Exercise Clause. In neither situation has Congress arrogated to itself the unrestricted power to define the Constitution.

In short, the judiciary's duty is to say what the law is, but that duty is not exclusive. The district court's holding that RFRA usurps the judiciary's power under *Marbury v. Madison* to interpret the Constitution is incorrect.

Nor are we persuaded by the City's argument that RFRA violates the separation of powers because it restores a test rejected in *Smith* as beyond the judiciary's competence to apply. *Smith* acknowledged that the legislative accommodation of religion "must be preferred to a system . . . in which judges weigh the social importance of all laws against the centrality of all religious beliefs." 494 U.S. at 890. However, the Court's rejection of the compelling interest test did not rest on judicial inability to apply the test. The compelling interest test is familiar to judges both in the context of free exercise claims, *see Smith*, 494 U.S. at 900-01 (O'Connor, J., concurring in the judgment), and elsewhere. *See, e.g., Adarand*, 115 S.Ct. at 2117 (subjecting all racial classifications to strict scrutiny).

Rather, the Court's rejection of the compelling interest test in free exercise claims rested on the Court's aversion to applying the test to facially neutral laws in the countermajoritarian arena of constitutional interpretation. *See* 494 U.S. at 888-889 (rejecting compelling interest test because it "would open the prospect of *constitutionally* required religious exemptions"). Again, it is one thing to apply the compelling interest test drawn from a statute where Congress can amend the underlying law if it disagrees with the resulting balance; it is another when the only response to the judiciary's application of the compelling interest test is a constitutional amendment.

We conclude that RFRA does not violate the separation of powers. Whether RFRA's requirement that judges determine whether a particular law "substantially burdens" the exercise of religion imposes upon the judiciary the duty of inquiring into the centrality of particular practices to a faith and whether that duty, if it exists, poses constitutional difficulties is not presented. *See Smith*, 494 U.S. at 887 & n.4. As we have explained, the full meaning of "substantially burdens" must be found in its application. It is self-evident that the vigor of the insistence that effects be substantial and the risks of error in locating incipient violations of the Free Exercise Clause are directly related. An anemic application of "sub-

stantial effect" pushes the limits of congressional power to remedy.

C.

Nor does RFRA mandate religious accommodations that violate the Establishment Clause. To the contrary, the act provides that "[n]othing in this chapter shall be construed to affect, interpret, or in any way address [the Establishment Clause]." 42 U.S.C. § 2000bb-4. In short, RFRA by its own terms provides that the accommodations mandated by RFRA may reach up to the limit permitted by the Establishment Clause but no further.

The City responds that, even so, RFRA on its face violates the Establishment Clause because it lacks a secular purpose and because it has the primary effect of advancing religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). We disagree. Its remedial justifications belie the City's contention that Congress acted with a sectarian purpose. Relatedly, "it is a permissible legislative purpose to alleviate significant governmental interference" with the exercise of religion. *Amos*, 483 U.S. at 335.

RFRA no more advances religion than any other legislatively, mandated accommodation of the exercise of religion. In *Amos*, the Court rejected the argument that an accommodation violates the primary effects prong of the *Lemon* test simply by virtue of being an accommodation. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337 (emphasis in original). RFRA's lifting of "substantial burdens" on the exercise of religion does not amount to the Government coercing religious activity through "its own activities and influence."

D.

Finally, the City urges that RFRA violates the Tenth Amendment because the act limits the power of the States to legislate "in the traditional areas of state sovereignty and prominence." The City mistakenly relies on the Court's decision last term in *United States v. Lopez*, 115 S.Ct. 1624 (1995), which held that the Gun Free School Zones Act exceeded Congress' power under the Commerce Clause. Congress, however, enacted RFRA pursuant to its power under Section 5 of the Fourteenth Amendment. Although the United States urges that the Commerce Clause also supports Congress' authority to enact RFRA, we have not reached that contention.

The Court has repeatedly noted that "the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments." *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991). On its face, RFRA does not intrude upon state sovereignty any more than the myriad other federal statutes that preempt state regulation.

That said, we do not suggest that the Tenth Amendment plays no role. *Gregory* itself recognized that the Court "has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." *Id.* To the contrary, "the Fourteenth Amendment does not override all principles of federalism." *Id.* at 469. Indeed, the Court in *Gregory* refused to construe a congressional act to reach state governmental functions in the absence of a clear statement from Congress that it intended to do so. *Id.* at 470. Such questions of RFRA's applicability to particular areas of state regulation, however, are best left for individual, case-by-case resolution. It is enough for us to conclude that RFRA on its face does not violate the Tenth Amendment.

V.

We hold that Section 5 of the Fourteenth Amendment empowered Congress to enact the Religious Freedom Restora-

tion Act. We further hold that RFRA does not usurp the judiciary's power to interpret the Constitution. Accordingly, we REVERSE the order of the district court holding the Religious Freedom Restoration Act unconstitutional on its face and REMAND for further proceedings not inconsistent with this opinion.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-94-CA-0421

Filed March 15, 1995

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

—v.—

THE CITY OF BOERNE

ORDER OF INTERLOCUTORY APPEAL

BEFORE THE COURT, in the above-captioned cause of action, is the special issue raised by Defendant, the City of Boerne, in which Defendant challenges the constitutionality of the recently passed Religious Freedom Restoration Act, 42 U.S.C. § 2000bb [hereinafter RFRA].

BACKGROUND

The United States Congress passed RFRA in early November of 1993 and it was signed by President Clinton on November 16, 1993.

RFRA sets out in pertinent part:

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

> (a) IN GENERAL. —Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION. —Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a *compelling governmental interest*; and
>
> (2) is the least restrictive means of furthering that *compelling governmental interest*.

(emphasis supplied).

Such an Act under normal circumstances would be readily enforceable by this Court: however, it has come to the Court's attention that this Act seeks to overturn an interpretation of the United States Constitution by the Supreme Court. Indeed, in the Congressional Findings and Declaration of Purposes, the Congress specifically sought to create a heightened burden of proof standard from that held in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Findings state in pertinent part:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment of the Constitution . . .
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . .
>
> The Purposes of this Act are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to

> guarantee its application in all cases where free exercise of religion is substantially burdened. . . .

On February 2, 1995, the Court was made aware of Defendant's special issue during a pretrial hearing and agreed to 1) Certify the Question pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States of America, and 2) for both parties to submit briefs addressing the constitutionality of RFRA. On March 3, 1995, Defendant submitted its brief. On March 6, 1995, Plaintiff submitted its reply brief and the Solicitor General agreed to intervene on behalf of the United States of America, likewise submitting a reply brief.

ANALYSIS

According to the holding of *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch. 137, 2 L.Ed. 60 (1803). Subsequent Supreme Court cases have echoed this fact:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as ultimate interpreter of the Constitution.

Baker v. Carr, 369 U.S. 186, 211 (1962). In *United States v. Nixon*, the Court stated:

> Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts by Article III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other

> conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court 'to say what the law is . . . .' "

418 U.S. 683, 704-05 (1974).

In this instance, Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA. The Supreme Court in *Smith* found the heightened standard applied in *Sherbert v. Verner*, 374 U.S. 398 (1963), to be limited over the years to cases within the unemployment compensation field. *Id.* at 884. The *Smith* Court added, "[e]ven if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable [ ] law." *Id.* The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.

The Court is cautious in its opinion of RFRA's unconstitutionality as there has been insufficient case law, to date, construing it. *See Belgard v. State of Hawaii*, No. 93-00961 (D. Haw. Feb. 3, 1995) (holding RFRA constitutional pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment)[1] Nevertheless, *Smith* remains the law

---

[1] This Court seriously questions the District Court of Hawaii's interpretation of RFRA's legitimacy through Section 5 of the Fourteenth Amendment. RFRA only mentions the First Amendment as the empowering provision to change the burden of proof standard to compelling interest. "Typically, the Court looks to the language of an Act or its legislative history for guidance on which power Congress understood itself to be invoking, and for factual support of its legal determination as to whether the power was invoked properly. As applied to federal law, Congress simply did not enter into such an inquiry regarding RFRA." Marci A. Hamilton, *The*

in this area for this Court to follow pursuant to the doctrine of *stare decisis*. The doctrine of *stare decisis* is not a universal, inexorable command, especially in cases involving the interpretation of the United States Constitution. *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S.Ct. 2791, 2861 (1992) (Rehnquist, J., dissenting). "Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983).

CONCLUSION

After reviewing the briefs on file and the law applicable to this area, the Court is of the opinion RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof as established under *Employment Division v. Smith*. Accordingly, the Court is of the opinion that this order holding RFRA to be unconstitutional "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation . . . ." 28 U.S.C. § 1292(b). Furthermore, the Court asks that expedited consideration of this appeal be had pursuant to F.R.A.P. Rule 5(a).

IT IS ORDERED the Religious Freedom Restoration Act of 1993 is unconstitutional.

Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357, 366 (1994). Furthermore, because the First Amendment is not an enumerated power of Congress, but merely a limitation, *Katzenbach v. Morgan* and its progeny are inapplicable. The First Amendment to the Constitution does not empower Congress to regulate all federal law in order to achieve religious liberty, unless it is done pursuant to an enumerated power. *Id.* at 363.

IT IS FURTHER ORDERED that an Interlocutory Appeal to the Fifth Circuit Court of Appeals be had pursuant to 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that expedited consideration of this appeal be had pursuant to F.R.A.P. 5(a).

IT IS FINALLY ORDERED the trial set for March 15, 1995 is stayed pending the outcome of the Interlocutory Appeal.

SIGNED this thirteenth day of March, 1995.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX C

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50306

Filed March 28, 1996
CHARLES R. FULBRUGE III CLERK

P F FLORES, Archbishop of San Antonio

Plaintiff-Appellant

—and—

UNITED STATES OF AMERICA

Intervenor-Plaintiff-Appellant

—v.—

CITY OF BOERNE

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO

ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 23, 1996, 5 Cir.F.3d)
(March 28, 1996)

Before

HIGGINBOTHAM, EMILIO M. GARZA and BENAVIDES,
Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR
STAY OF THE MANDATE.

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-94-CA-0421

Filed March 16, 1995

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO

—v.—

THE CITY OF BOERNE

ORDER

Pursuant to the Court's February 3, 1995 Certification Order, it has provided the United States the right to intervene in the above-captioned action in order to defend the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. On March 6, 1995, the United States notified the Court that it elected to intervene in order to defend the constitutionality of the Religious Freedom Restoration Act and filed a brief on the issue on the same day. Accordingly,

IT IS HEREBY ORDERED that the United States is granted leave to intervene in this action.

SIGNED this 13th day of March, 1995.

/s/ LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50306

[Stamped and Filed in U.S. Court of Appeals
January 23, 1996
CHARLES R. FULBRUGE III CLERK]

[Stamped and Filed in Clerk, U.S. District Court
Western District of Texas
April 11, 1996
BY DEPUTY CLERK]

D.C. Docket No. SA-94-CV-421

P F FLORES, Archbishop of San Antonio

Plaintiff-Appellant

—and—

UNITED STATES OF AMERICA,

Intervenor-Plaintiff-Appellant,

—v.—

CITY OF BOERNE

Defendant-Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO

Before

HIGGINBOTHAM, EMILIO M. GARZA, and BENAVIDES,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the order of the district court in this cause is reversed, and this cause is remanded for further proceedings not inconsistent with this opinion

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APRIL 09, 1996

OP-11-S

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ DAWN SHULIN
Deputy
New Orleans, Louisiana
April 09, 1996

APPENDIX F

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I

LEGISLATIVE DEPARTMENT

Section 1. [Legislative powers vested in Congress.]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE III

JUDICIAL DEPARTMENT

Section 1. [Judicial power.]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

AMENDMENT 1

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. [Citizenship—Due process of law—Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Sec. 2. [Representatives—Power to reduce apportionment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United

States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

CHAPTER 21B—
RELIGIOUS FREEDOM RESTORATION

---

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wiscon-

sin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub.L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

* * *

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub.L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

* * *

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub.L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub.L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

* * *

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or any any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub.L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

APPENDIX H

CITY OF BOERNE
ZONING ORDINANCE

INCLUDING ORDINANCE NO. 94-17
Adopted October, 1994

Adopted
August 22, 1983

Reprinted August, 1992

ZONING ORDINANCE
OF
THE CITY OF BOERNE, TEXAS

ORDINANCE NO. 83-12

A COMPREHENSIVE ORDINANCE REGULATING AND RESTRICTING:

- THE USE OF LAND,
- THE USE AND LOCATION OF BUILDINGS AND STRUCTURES,
- THE HEIGHT, NUMBER OF STORIES AND SIZE OF BUILDINGS AND OTHER STRUCTURES,
- THE CONSTRUCTION, RECONSTRUCTION, ALTERATION OR REPAIR OF BUILDINGS, STRUCTURES, OR LAND,
- THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED,
- THE SIZE OF YARDS, COURTS AND OTHER OPEN SPACES,
- THE DENSITY OF POPULATION;

DIVIDING THE CITY OF BOERNE INTO DISTRICTS FOR SUCH PURPOSE, ADOPTING MAPS OF SAID CITY SHOWING THE BOUNDARIES AND CLASSIFICATION OF SUCH DISTRICTS, ESTABLISHING A PLANNING AND ZONING COMMISSION AND A BOARD OF ADJUSTMENT, PRESCRIBING PENALTIES FOR VIOLATION OF ITS PROVISIONS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:

ARTICLE I.

In General

SECTION 1. SHORT TITLE

This ordinance shall be known and may be cited as the "Zoning Ordinance" of the City of Boerne.

SECTION 2. PURPOSE

The zoning regulations and districts as herein established have been made in accordance with a comprehensive plan for the purpose of:

> promoting health, safety, morals and the general welfare of the City, and for the protection and preservation of places and areas of historical and cultural importance and significance therein.

They have been designed to:

- lessen congestion in the streets,
- secure safety from fire, panic, and other dangers,
- provide adequate light and air,
- prevent the overcrowding of land,
- avoid undue concentration of population,
- facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

They have been made with reasonable consideration, among other things, for:

- the character of the district and its peculiar suitability for particular uses.
- and with a view to conserving the value of the buildings,
- and encouraging the most appropriate use of the land throughout the City consistent with comprehensive planning.

AUTHORITY

SECTION 3. ORDINANCES REPEALED AND SCOPE

The following ordinances are herein repealed, to-wit:

A. The "Zoning Ordinance" of the City of Boerne, passed and adopted on April 23, 1973, amended on July 26, 1973.

B. All other ordinances or parts of ordinances inconsistent herewith, but only to the extent of such inconsistency; provided, however, that whenever higher or more restrictive standards are established by the provisions of any other applicable statute, ordinance or regulation than are established by the provisions of this ordinance, the provisions of such other statute, ordinance or regulation shall govern.

SECTION 4. ADOPTION OF LEGISLATIVE GRANT OF POWER

Articles 1011a through 1011k of the Revised Civil Statutes of the State of Texas are hereby adopted, and the provisions of the ordinance are adopted in the exercise of the power granted to municipalities by such statutes and pursuant to any and all other applicable laws.

SECTION 5. VALIDITY

If any section, paragraph, subdivision, clause, phrase, or provision of this ordinance shall be adjudged invalid or held unconstitutional, the same shall not affect the validity of this ordinance as a whole, or any part or provision thereof, other than the part so decided to be invalid or unconstitutional.

ORDINANCE NO. 91-05

AN ORDINANCE AMENDING ORDINANCE NO. 85-11 CAPTIONED "ARTICLE VIII. HISTORIC LANDMARK PRESERVATION, "PROVIDING FOR PROCEDURES FOR THE CREATION OF HISTORIC DISTRICTS, THE ISSUANCE OF BUILDING PERMITS IN A HISTORIC DISTRICT, AND FOR HISTORIC LANDMARKS, PROVIDING FOR TAX EXEMPTION FOR BUILDINGS SUBSTANTIALLY REHABILITATED AND/OR RESTORED; PROVIDING FOR A PENALTY; AND DECLARING AN EFFECTIVE DATE.

WHEREAS, the Legislature of the State of Texas has enacted Article 1011a, Vernon's Annotated Civil Statutes, empowering cities of the State of Texas to adopt regulations and restrictions for the preservation and protection of historical places and areas of historical and cultural importance and significance; and

WHEREAS, the City Council of Boerne is aware that the City of Boerne has various areas, places, buildings, and structures having significant historical value which reflect the heritage of the City, the State, and its people; and

WHEREAS, it is recognized that rapid change in population, economic functions and land use activities has led and is leading to the increased demolition of these landmarks so that the City, the State, and the Nation are thereby losing a part of their heritage;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOERNE, TEXAS:

That Ordinance No. 85-11, dated May 20, 1985, and all amendments thereto, are hereby canceled and superseded by the following ordinance:

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE CITY OF BOERNE BY ADDING AN ARTICLE VIII ENTITLED "HISTORIC LAND-

MARK/HISTORIC DISTRICT PRESERVATION"; PROVIDING A DECLARATION OF POLICY; PROVIDING FOR A DEFINITION OF HISTORIC LANDMARK AND HISTORIC DISTRICT; PROVIDING FOR THE CREATION OF A HISTORIC LANDMARK COMMISSION; PROVIDING FOR THE SELECTION OF A HISTORIC LANDMARK PRESERVATION PLAN; PROCEDURE FOR SEEKING HISTORIC LANDMARK DESIGNATION AND REMOVAL; PROCEDURE FOR SEEKING BUILDING PERMIT; PROCEDURE WHEN BUILDING PERMIT IS NOT REQUIRED; PROCEDURE FOR REQUESTING PUBLIC OWNERSHIP OR CONTROL OF HISTORIC LANDMARKS; PROVIDING FOR APPEAL PROCEDURE; PROVIDING FOR A PENALTY; PROVIDING FOR TAX EXEMPTION FOR BUILDINGS SUBSTANTIALLY REHABILITATED AND/OR RESTORED; PROVIDING FOR TAX EXEMPTION REMOVAL; PROVIDING FOR THE DEMOLITION OF HAZARDOUS STRUCTURES; PROVIDING A SEVERABILITY CLAUSE AND DECLARING AN EFFECTIVE DATE.

ARTICLE VIII.

HISTORIC LANDMARK PRESERVATION

Declaration of Policy

The City Council hereby finds and declares as a matter of public policy that the protection, enhancement, preservation and use of historic la dmarks is a desirable public goal and is needed in the interest of the culture, prosperity, education and general welfare of the people. The purposes of this Section are:

(a) To protect, enhance and perpetuate selected historic landmarks which represent or reflect distinctive and important elements of the city's and State's architectural, archeological, cultural, social, economic, ethnic and political history and to develop appropriate settings for such places.

(b) To safeguard the City's historic and cultural heritage, as embodied and reflected in such historic landmarks, by appropriate regulations.

(c) To stabilize and improve property values in such locations.

(d) To foster civic pride in the beauty and accomplishments of the past.

(e) To protect and enhance the City's attractions to tourists and visitors and provide incidental support and stimulus to business and industry.

(f) To strengthen the economy of the City.

(g) To promote the use of historic landmarks for the culture, prosperity, education and general welfare of the people of the City and visitors to the City.

SECTION 1. DEFINITIONS

1.1 Historic Landmark.

As used in this ordinance, the term "Historic Landmark" shall mean any building, structure, site, area or land of architectural, historical, archeological or cultural importance or value, which the City Council has determined should be protected or preserved .

1.2 Historic District.

Districts which may be designated as Historic Districts shall mean geographically definable areas possessing significant concentrations, linkage or continuity of buildings, structures, sites, areas or lands which are united by architectural, historical, archaeological or cultural importance of significance.

SECTION 2. HISTORIC LANDMARK COMMISSION—CREATED

2.1 *Composition*: There is hereby created a Commission to be known as the "Historic Landmark Commission" of the City of Boerne, Texas.

2.2 *Qualifications*: To the extent possible, the City Council shall appoint members to the Commission who have a background in architecture, urban design, history, or similar professions or have an historical preservation interest.

2.3 *Terms of Office*: The appointed members of the Commission shall be identified by place numbers one (1) through nine (9). Upon adoption of this ordinance, places one (1) through five (5) shall be appointed to serve two (2) years. Places six (6) through nine (9) shall be appointed to serve four (4) years. After the first term expires, all terms shall be for four (4) years . Any vacancy occurring shall be filled by appointment only for the unexpired portion of the term. Any member may be removed by the City Council after a hearing. The Chairman and Vice-Chairman shall be appointed by the City Council.

2.4 *Meetings*:

2.4.1 *Regular Meetings.* Regular meetings may be held at the call of the Chairman or at the request of any five (5) Commission members. All members shall have seven (7) calendar days prior notice of the meeting, excluding the day of the notice and the day of the meeting.

2.4.2 *Special Meetings.* The Chairman shall call a special meeting within five (5) working days of receiving notice from the Building Inspector to consider the issuance of a Certificate of Appropriateness.

2.5 *Voting and Quorum*: The presence of six (6) appointed members constitutes a quorum at a regular meeting. No action may be taken on an application without a quorum present. The concurring vote of three-fourths (3/4) of the present members is necessary to make a motion or decision valid. Special meetings called by the Chairman to discuss the issuance of a certificate of appropriateness shall require five members to constitute a quorum. The concurring vote of 80% of the members present is necessary to make a motion or decision valid.

2.6 *Conduct of Business*: The Commission shall adopt rules for the conduct of its business and election of officers other

than the Chairman and Vice-Chairman. The minutes of all meetings shall be kept and shall be available for public inspection in the office of the City Secretary.

2.7 *Hearings and Notice*: The Commission shall not act upon any request for historic landmark designation or upon any request for a building permit or certificate of appropriateness without having first given the applicant for the designation or permit adequate notice of the Commission meeting and his/her right to be present and to be heard if so desired. All meetings shall be open to the public. Notice of meetings shall also be posted on the appropriate bulletin board in City Hall prior to the meeting date in compliance with current State Laws.

SECTION 3. HISTORIC LANDMARK PRESERVATION PLAN

3.1 The Commission shall thoroughly familiarize itself with buildings, structures, sites, districts, areas, and lands within the City which may be eligible for designation as historic landmarks and shall prepare an historic landmark preservation plan, hereinafter referred to as the "Preservation Plan," which shall be for the general guidance of City government, City property owners and the Commission. The plan shall:

3.1.1 Establish criteria to be used in determining whether certain buildings, structures, sites, districts, areas, lands and other objects should be designated as historic landmarks.

3.1.2 Establish guidelines to be used in determination of whether to grant or deny certificates of demolition or removal.

3.1.3 Formulate a program for private and public action which will state the role of various City agencies in preservation of historic landmarks.

3.1.4 Suggest sources of funds for preservation and restoration activities and acquisitions, to include federal sources, state sources, foundation sources, local private sources, as well as municipal assistance.

3.1.5 Recommend to the proper local agencies incentives to be offered to encourage historic preservation.

3.2 The Preservation Plan shall be presented to the City Planning and Zoning Commission for consideration and recommendation to the City Council for inclusion in the comprehensive plan of the City of Boerne.

SECTION 4. PROCEDURE FOR SEEKING HISTORIC LANDMARK DESIGNATION

4.1 Any person or entity may request an historic landmark designation for property owned by such person or entity by submitting an application in duplicate to the City Administrator, City of Boerne, stating the following:

4.1.1 Name, telephone number and mailing address of applicant.

4.1.2 Location and address of property to be designated.

4.1.3 Reasons for requesting the designation. This section of the application need not be extensive but should include, if available, approximate time of construction, and past and present usage of the building.

4.2 Upon receipt of such application, the City Administrator shall submit a copy of the application to the Chairman, Historic Landmark Commission, who shall initiate a review of the application within the following thirty (30) days. The concurring vote of 3/4 of the members present shall approve or otherwise reject such application. Upon approval by the Commission after a public hearing, the application shall be presented to the City Planning and Zoning Commission for their review, comment and referral to the City Council. The City Council may designate said property as an historical site, area, or building if within the discretion of the City Council such property is deemed to have historical, cultural, archeological or educational value which reflects the heritage of the City.

4.3 Should such application be rejected by the Historic Landmark Commission or the Planning and Zoning Commission, the applicant will be so notified and applicant may, within sixty (60) days, appeal the decision to the City Council. All decisions of the Historic Landmark Commission and the Planning and Zoning Commission, either to approve or disapprove an application, shall be reported to the City Council.

4.4. The suffix "H" for Historic Landmark designation shall be used in addition to the conventional designation established by the Zoning Ordinance for the particular land parcel, area, or district involved.

SECTION 5. PROCEDURE FOR REMOVAL OF HISTORIC LANDMARK DESIGNATION

The designation of an historic landmark may be removed at the request of the original petitioner by making such a request known to the Landmark Commission. The request for removal will contain information pertaining to the future use and disposition of the designated landmark.

A request for historic landmark designation removal shall be acted on by the Landmark Commission within thirty (30) days after receipt of a request for designation removal. The Commission shall base their decision on information in the request, and may recommend to the City Council that the petition be granted immediately or delayed for a period of up to one hundred eighty (180) days while Commission proceeds under SECTION 8. If at the end of this period no action has been taken by the City, the designation shall be automatically removed.

The Landmark Commission shall provide information and counseling to owners of designated historic landmarks upon their request.

SECTION 6. CREATING HISTORIC DISTRICTS

The City Council may, from time to time, designate certain areas in the City of Boerne as Historic Districts, and define, amend or eliminate the boundaries of same.

For purpose of clarity in the zoning designation of property, the zoning maps shall reflect property in historic districts by the inclusion of the letter "H" as a suffix on the map designation.

Nothing contained in this article or in the designation of property as being in an historic district or historic landmark shall affect the present use of the property. Use classification as to all property which may be included in an historic district shall continue to be governed by the Zoning Ordinance of the City of Boerne and the procedures established therein.

Procedure for Creation and Amendment of an Historic District:

6.1 Before the Landmark Commission. The Landmark Commission shall recommend to the Planning and Zoning Commission those areas it determines should be included in an Historic District. In making the recommendation, the Landmark Commission shall consider one or more of the following criteria:

6.1.1 Character, interest or value as part of the development, heritage or cultural characteristics of the City.

6.1.2 Location as the site of an historical event.

6.1.3 Embodiment of distinguishing characteristics of an architectural type or specimen.

6.1.4 Relationship to other distinctive buildings, sites, districts or structures which are historically significant and preserved, or which are eligible for preservation.

6.1.5 Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the City.

6.1.6 Value as an aspect of community sentiment or public pride.

6.1.7 Identification with a person or persons who significantly contributed to the development or culture of the City.

6.2 The Landmark Commission shall prepare and forward to the Planning and Zoning Commission the following information:

6.2.1 A list of specific buildings, structures, areas or lands of importance or value within the proposed district boundaries and a description of how the particular building, structure, site, area or land meets the aforementioned criteria.

6.2.2 A map showing the boundaries of the proposed Historic District.

6.2.3 The Landmark Commission shall hold a public hearing for those owners of real property within the proposed Historic district . Those owners shall be notified not less than ten (10) days before the date of the hearing.

Following the hearing, the Landmark Commission shall forward to the Planning and Zoning Commission its recommendation.

Before the Planning and Zoning Commission.

The Planning and Zoning Commission shall give notices, conduct its hearing and make recommendations to the City Council in the same manner and according to the same procedures as specifically provided in ARTICLE V, SECTION 5.A of the City of Boerne Zoning Ordinance.

Before City Council.

The City Council shall accept recommendations from the Planning and Zoning Commission and follow those proce-

dures set forth in ARTICLE V, SECTION 5.B of the City of Boerne Zoning Ordinance.

SECTION 7. EVALUATION OF PROPOSED EXTERIOR CHANGES TO STRUCTURES WITHIN A HISTORICAL DISTRICT OR DESIGNATED HISTORIC LANDMARK

7.1 The Building Inspector shall review and determine whether or not the proposed exterior changes require a building permit or certificate of appropriateness to be issued. The Building Inspector shall notify the Chairman within two working days of receiving the plans.

7.1.1 *Procedure for the Landmark Commission When A Building Permit Is Required.* The Chairman, upon receipt of the Building Inspector's recommendation that a building permit is required, shall call for a regular meeting of the Landmark Commission within seven (7) calendar days.

7.1.1.1 Upon receipt of an application for a building permit for the construction, reconstruction, alteration, restoration, relocation, demolition or razing of a building or buildings in the historic district or historic landmark, the Landmark Commission shall schedule a meeting to consider the recommendation which the Commission will give to the Building Inspector. The person applying for the permit shall be advised of the time and place of said meeting in writing and invited to appear to explain his reasons therefor. The Landmark Commission may invite such other persons or groups as it desires to attend its meetings.

7.1.1.2 *Historic Districts & Historic Landmarks.* In determining the recommendation to be presented to the Building Inspector concerning the issuing of a permit for the construction, reconstruction, alteration, restoration, relocation, demolition or razing of all or part of any building within the historic district, and/or all or part of any designated historic landmark, the

Landmark Commission shall consider the following matters:

(a) The effect of the proposed change upon the general historic cultural and architectural nature of the district.

(b) The appropriateness of exterior architectural features which can be seen from a public street, alley, trail or walkway.

(c) The general design, arrangement, and material of the building or structure and the relation of such factors to similar features of buildings or structures in the district.

(d) The criteria used shall not be the aesthetic appeal to the Landmark Commission of the structure or the proposed remodeling, but rather its conformity to the general character of the Historic District.

(e) Harmony with adjacent buildings (scale, height and mass).

(f) The value of the historic district as an area of unique interest and character and its not being impaired.

7.1.1.3 Upon review of any application, if the Landmark Commission finds the proposed work of a nature which will not adversely affect any significant historical landmark, and is appropriate and consistent with the spirit and purposes of this article, it shall enter this decision into the official minutes and so advise the City Building Inspector who will then issue the Building Permit. No change contrary to the intent of this article shall be made in the building plans or the permit application after the application has been approved by the Landmark Commission without the written approval of the Landmark Commission of such desired changes.

7.1.1.4 If the Commission finds that the proposed work will adversely affect or destroy any significant historical feature of the designated historic landmark or is inappropriate or inconsistent with the spirit and purposes of this article, it shall enter this decision into the official minutes and so advise the City Building Inspector in writing. The written decision shall also describe the changes that will be necessary before the permit application can be approved. The City Building Inspector shall forward a copy of this decision to the applicant as soon as received.

7.1.1.5 If the applicant is willing to comply with the changes described by the Commission, he may make any required changes in the plans and the application and resubmit the application to the Commission in the same manner as previously described.

If the applicant is unwilling to comply with the changes described by the Commission, the Building Permit shall not be approved and issued.

7.1.1.6 Action shall be taken on any application for a Building Permit within forty-five (45) days after the application has been received by the Landmark Commission Chairman. If no action is taken within the forty-five (45) day limit, the Building Permit shall be deemed approved and the City Building Inspector shall immediately so advise the applicant in writing.

7.1.1.7 Ordinary repair or maintenance which does not involve changes in exterior architectural features and which does not otherwise affect the historical value or style of a structure within a historical district or a designated historic landmark shall be exempt from the provisions of Section 7.1.1. (For purposes of this Section 7.1.1, "exterior architectural features" is construed to include but is not limited to architectural style and general arrangement of such portion of the exterior of a structure as is desired to be open to view from a public way).

7.1.2 *Procedure for Obtaining A Certificate of Appropriateness.*

Any proposed exterior changes and alterations not requiring a building permit as determined by the Building Inspector shall be forwarded to the Chairman of the Historic Landmark Commission who shall call a special meeting within five (5) calendar days of receiving the request.

7.1.2.1 Any proposed exterior changes and alterations not requiring a building permit as determined by the Building Inspector shall be submitted in writing directly to the Historic Landmark Commission for a Certificate of Appropriateness, which must be granted before such work can be undertaken.

The application must specifically describe the alterations or changes proposed. Any applicant may appear at a regular or special meeting of the Commission before submitting an application and may consult with said Commission during the review of the application.

7.1.2.2 Upon review of the application, if the Commission finds the proposed work of a nature which will not adversely affect any significant architectural or historical feature of a designated historic landmark, and which is appropriate and consistent with the spirit and purpose of this article, it shall forward a Certificate of Appropriateness to the applicant within thirty (30) days of the receipt of said application.

7.1.2.3 If the Commission finds that the proposed work will adversely affect or destroy any significant architectural or historical features of the designated historic landmark, or is inappropriate or inconsistent with the spirit and purpose of this article, it shall notify the applicant within thirty (30) days of receipt of said application that the application has been disapproved.

7.1.2.4 If no action has been taken by the Commission within the prescribed time for approval or disapproval, the application shall be deemed approved.

7.1.2.5 No change shall be made in the application for issuance of a Certificate of Appropriateness without resubmittal to the Commission and approval of the changes in the same manner as provided above.

7.1.2.6 After a decision is reached by the Commission denying an application for a Certificate of Appropriateness, a resubmittal of an application will not be accepted for an additional hearing within a six (6) month period from the date of final decision except upon written request of the applicant, indicating the incorporation of all changes in plans and specifications to the original application as recommended by the Commission which would protect the distinctive character of the historic landmark.

7.1.2.7 Ordinary repair or maintenance which does not involve changes in architectural and historical value, style, general design, arrangement, texture, material or color are exempt from the provisions of this article.

SECTION 8. PROCEDURE FOR REQUESTING PUBLIC OWNERSHIP OR CONTROL OF HISTORIC LANDMARKS

If the Commission finds that a designated historic landmark cannot be preserved without acquisition, the Commission shall recommend to the City Council that it be acquired by a gift, devise, or purchase by funds donated by individuals or public groups.

SECTION 9. APPEAL PROCEDURE

Any applicant or interested person aggrieved by a ruling of the Landmark Commission, may, within sixty (60) days of the date of the notice of the Landmark Commission's decision, appeal to the City Council.

SECTION 10. PENALTY

It shall be unlawful to alter, demolish, or remove any exterior feature of any designated historic landmark or structure within a Historic District, or to change materially by additions, reconstruction, alteration or maintenance the exterior of any designated historical landmark. Any person violating any provision of this ordinance shall be guilty of a misdemeanor and shall be subject to a fine not to exceed One Thousand Dollars ($1,000.00) for each offense, and each day or portion thereof that a violation continues shall be considered a separate offense.

In addition to other remedies, the City Administrator, or his duly authorized representative, may institute any appropriate action or proceedings to prevent such unlawful construction, restoration, demolition, razing or maintenance or to prevent any illegal act or business in or about such premises.

SECTION 11. TAX EXEMPTION

11.1 In accordance with the provisions of this ordinance and Section 11.24 of the Texas Tax Code, the owner(s) of a building, which is located within an historic district, which the City Council has designated as a historically significant site in need of tax relief to encourage its preservation, and has been substantially rehabilitated and/or restored as approved by the Landmark Commission, may apply to City Council for a tax exemption yearly. Upon approval by City Council, the assessed value of the property for ad valorem taxation shall be equal to the assessed value prior to the substantial rehabilitation or restoration, for a period not to exceed ten (10) consecutive years.

This exemption shall begin on the first day of the first tax year after the completion of the preservation.

The deed, grant, sale, bequest, devise or other transfer of ownership of the property shall not cause the exemption provided herein to terminate.

SECTION 11.2 APPLICATION

Applications for an historic structure preservation tax exemption shall be filed with the Landmark Commission. The Landmark Commission, following approval, shall forward the application to the City of Boerne City Council. Each application shall be signed and sworn to by the owner of the property and shall:

11.2.1 State the legal description of the property proposed for exemption;

11.2.2 Include an affidavit by the owner describing the historic significance of the structure in need of tax relief;

11.2.3 Include a final complete set of plans for the historic structure's restoration or rehabilitation;

11.2.4 Include a statement of costs for the restoration or rehabilitation work;

11.2.5 Include a projection of the estimated construction, time and predicted completion date of the historic restoration or rehabilitation;

11.2.6 Authorize the members of the Landmark Commission, the City Tax Assessor/Collector, and other City officials to visit and inspect the property as necessary to certify that the property in question is in substantial need of restoration or rehabilitation;

11.2.7 Include a detailed statement of the proposed use for the property; and

11.2.8 Provide any additional information to the Landmark Commission which the owner deems relevant or useful such as the history of the structure or proposed access to the structure by the public.

SECTION 11.3 EXEMPTION REMOVAL

The Landmark Commission shall inspect annually all those properties which have been granted tax exemptions. If, in the opinion of the Landmark Commission, said property is no

longer being maintained in an acceptable state of repair, the Landmark Commission shall contact the owner(s) of the property and discuss their concerns with them.

Following such discussion, the Landmark Commission shall make a report to the City Council either requesting that the tax exemption be terminated on the last day of the tax year for that parcel, or outlining the steps the property owner shall take to bring the property up to acceptable standards.

City Council, upon receipt of the report of the Landmark Commission, may remove the tax exemption if it deems such action appropriate.

SECTION 12. DEMOLITION OF HAZARDOUS STRUCTURES

Nothing in this ordinance shall apply to or in any way prevent the demolition of any building which is an imminent danger to public health and safety and which cannot be made reasonably safe according to the opinion of the City Building Inspector.

SECTION 13. EFFECT OF PARTIAL INVALIDITY

If any part of any provision of this Ordinance shall be declared void or unconstitutional by a court having competent jurisdiction, such declaration shall in no way affect the remaining parts or provisions, and they shall remain in full force and effect.

SECTION 14. EFFECTIVE DATE

This Ordinance will take effect ten (10) days after final passage and publication as required by law.

READ AND APPROVED on first reading this, the 11th day of JUNE, 1991.

READ, APPROVED AND ADOPTED on second reading this, the 25th day of JUNE, 1991.

APPROVED:

/s/ Patrick Heath
Mayor

ATTEST:

/s/ Bernell Norton
City Secretary